Jurisdictional Statement

81-840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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ALEXANDER L. STEVAS,
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NO.

GENE PETERS,

Appellant,

vs.

LES J. SJOHOLM and JANE DOE SJOHOLM, his wife, and PUGET SOUND NATIONAL BANK,

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On Appeal From the Supreme Court of the State of Washington

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

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NO.

GENE PETERS,

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vs.

LES N. SJOHOLM and JANE DOE his wife, and PUGET SOUND NATIONAL BANK,

Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

I. Does a citizen have a reasonable expectation of privacy protected by the Fourth Amendment to the United States Constitution in moneys deposited in his personal bank account?

II. Have the Fourth Amendment requirements of a warrant, probable cause, and prior judicial review been satisfied by the issuance of an administrative tax warrant by a state department of revenue following an administrative hearing establishing a tax assessment?

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STATUTES

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OPINIONS BELOW

The opinion of the Supreme Court of Washington, which appears in the appendix p. 1, is reported at 95 Wn.2d 871, 631 P.2d 937, July 30, 1981.

The opinion of the Court of Appeals of the State of Washington, affirmed by the Washington Supreme Court, which appears in the appendix at p. 19 is reported at 25 Wn.App. 39, 609 P.2d 526, Dec. 1979. The order of the Superior Court for Pierce County granting the Respondent's motions for summary judgment on August 13, 1978 appears in the appendix at p. 26.

GROUNDS OF JURISDICTION

The judgment of the Supreme Court of Washington, affirming the seizure of funds in appellant's bank account, thereby denying appellant's Fourth and Fourteenth Amendment claims, was entered on July 30, 1981, see appendix p. 1. A Notice of Appeal to this Court was filed in the Supreme Court of Washington on October 2, 1981, see appendix

p. 34.

This appeal is being docketed in this Court under Rule 28.2 within 90 days from the filing of the opinion below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourteenth Amendment, United States Constitution:

> "Section 1. ....nor shall any State deprive any person of life, liberty, or property, without due process of law....

R.C.W. 82.32.210

For text please see appendix p.

R.C.W. 82.32.235

For text please see appendix p.

STATEMENT OF THE CASE

The Appellant, Gene M. Peters, as independent logger in Lewis County, Washington, was audited by the Washington Department of Revenue on October 6, 1975. Following the audit, a Notice of Tax Assessment under R.C.W. 82.32.050 was issued alleging $1,501.15 owed by Mr. Peters. Mr. Peters appeared at an administrative conference on April 26, 1976 to contest the assessment and raised factual, constitutional and statutory claims. The conference officer rejected Mr. Peters' factual claims and refused to address his statutory constitutional claims. Following this ruling, the Washington Department of Revenue sought enforcement of Tax Warrants it administratively issued by proceeding under R.C.W. 82.32.235 to administratively issue a "Notice and Order to Withhold and Deliver" which was served by Les N. Sjoholm, a department employee, on Mr. Peter's personal bank, Puget Sound National Bank. No search warrant or judicial review was sought by the Department of

Revenue prior to this seizure.

Puget Sound National Bank surrendered the balance of Mr. Peters' personal account to the Department of Revenue. As soon as Mr. Peters learned of the seizure of his personal account from his Bank by the Department of Revenue, he filed suit in Superior Court for Pierce County alleging violations of the Fourth and Fourteenth Amendments to the United States Constitution by the seizure of his funds without a search warrant. Following defense motions for summary judgment, Mr. Peters' claims were dismissed by the trial court. Mr. Peters appealed to the Washington Court of Appeals, Division II which affirmed the dismissal holding no violation of the Fourth and Fourteenth Amendment rights had occurred. Mr. Peters sought review in the Washington Supreme Court which rejected his Fourth and Fourteenth Amendment claims holding that the administrative conference provided by the Department of Revenue was adequate protec-

tion of his Fourth and Fourteenth Amendment rights. Appeal to this court followed.

THE QUESTIONS ARE SUBSTANTIAL

This case offers the opportunity to resolve the recurring and troublesome Fourth and Fourteenth Amendment questions created by summary seizure of assets by government in the exercise of its power to raise revenue. Substantial confusion currently exists in lower courts of the federal system and in the state courts because of two unreconciled lines of decisions of this Court: (1) This Court has consistently upheld summary assessment of taxes under the due process clauses of the Fifth and Fourteenth Amendments because of the overriding governmental interests in raising revenue and because of the historical practice of summary proceedings in taxation prior to the adoption of the Constitution, see, e.g.: Den ex dem. Murray v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1856), Phillips v. Commissioner, 382 U.S. 589 (1931), and Fuentes v. Shevin, 407 U.S. 67 (1972).

(2) A second line of cases has required seizure of property accomplished by summary proceedings by a government engaged in enforcing tax liability to meet the Fourth Amendment requirement of a warrant, and probable cause, see e.g., G. M. Leasing Corp., v. U.S., 429 U.S. 338 (1977).

Substantial difficulty has been experienced in the lower federal courts and in State Supreme Courts in applying those two lines of authority to common and recurring practices of seizures of taxpayer property. See, e.g., U.S. v. New England Merchants National Bank, 465 F.Supp 83, (D.C. Mass) 1979; U.S. v. First Nat. City Bank, 388 F. Supp. 1044 (S.D.N.Y. 1974), aff'd 568 F.2d 853 (2nd Cir. 1977); and Brunwasser v. Jacob, 453 F.Supp 567 (W.D.Pa.) 1978. The extent of Fourth Amendment protection has been extensively debated in the State Courts, see e.g., Burrows v. Superior Court of San Bernardino Co., 13 Cal.3d 238, 118

Cal. Reptr. 166, 529 P.2d 590 (1975); Charnes v. Di Giacoma, 612 P.2d 1117 (Colo. 1980); Commonwealth of Pennsylvania v. De John, 403 A.2d 1283 (Penn. 1979), cert. den. 444 U.S. 1032 (1980); People v. Blair, 25 Cal.3d 640, 159 Ca. Reptr. 818, 602 P.2d 738 (1979); State v. McCray, 15 Wn.App. 810, 551 P.2d 1376 (1976); and In re Grand Jury Proceedings 483 F.Supp. 422 (ED.Pa. 1979).

In Appellant's case, the Supreme Court of Washington focused on the confusion it felt had been created:

> "The applicability of the Fourth Amendment to bank deposits is unclear. In G.M. Leasing Corp v. United States, supra, the Internal Revenue Service (IRS) seized a taxpayer's bank account. The district court held it was constitutional, but the Supreme Court did not address that aspect of the case. The court, however, did state that the full panoply of Fourth Amendment protections applies to IRS seizures which intrude upon a taxpayer's privacy. As for all other IRS seizures, the court implied that there must only be probable cause that the seized items belong to the taxpayer.

The subsequent case law is

> divided as to whether that means the Fourth Amendment applies only to seizures made on the taxpayer's private premises, (cite omitted), or whether it applies generally to all IRS seizures regardless of where made. (Cite omitted)
>
> The disagreement stems from the court's abbreviated treatment, and approval of the IRS seizure of vehicles in public places. The court stated that if there is probable cause to believe that such a vehicle belongs to the taxpayer, the IRS may seize it without a warrant. Because the court did not require the existence of any exigent circumstances (which the Fourth Amendment has been read to require in other contexts involving the seizure of parked cars), some courts have said the Fourth Amendment must not apply to seizures unless conducted on the taxpayer's private premises." (Emph Add)

As the Washington Supreme Court pointed out Appellant's case presents the issues left unresolved in G.M. Leasing Corp. v. U.S., supra: Is there a reasonable expectation of privacy in money deposited in a personal bank account under Katz v. U.S., 389 U.S. 347 (1967)? Secondly, if there is, is a search warrant required independently of

the presence of probable cause? As the concurring opinion in the Washington Supreme Court pointed out, confusion between penal forfeiture cases and true tax assessment enforcement actions such as Appellant's case have further complicated lower courts' attempts to apply the Fourth Amendment in this area. See opinion, 878-888 set forth in Appendix. Compare U.S. v. One 1975 Pontiac Lemans, 621 F.2d 444 (1st Cir. 1980), to U.S. v. McCormick, 502 F.2d 281 (9th Cir. 1974) and U.S. v. Karp, 508 F.2d 1122 (9th Cir. 1974) cert. den. 422 U.S. 1007; Matter of Gerwig, 461 F.Supp 449 (C.D. Calif.) 1978 and Matter of Brickner, 453 F.Supp 91 (E.D. Wis.) 1978.

Because of the historical role of the Fourth Amendment in protecting against governmental seizure of property for tax purposes without judicial warrant, (see Boyd v. U.S. 116 U.S. 616), and the necessity of a bank account as a method for safekeeping and

keeping private one's money in a modern society, see Burrows, supra at 596, the court should now review the question of summary warrantless seizure of a personal bank account left unanswered in G.M. Leasing Corp, supra.

CONCLUSION

In light of the confusion rendered by differing interpretations of U.S. v. Miller, 425 U.S. 435 (1976), G.M. Leasing Corp, supra, and Katz v. U.S., supra on the expectation of privacy; the confusion of summary forfeiture cases such as One 1975 Pontiac LeMans supra, U.S. v. McCormick, supra, and U.S. v. Bluhm, 414 F.2d 1240 (7th Cir. 1969) cert. den. 397 U.S. 910 (1970), and the confusion of summary due process cases such as Den ex dem Murray, supra, this court should note probable jurisdiction and set the case for full briefing and argument.

Respectfully submitted,

John A. Strait
Counsel for Appellant

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

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[No. 46865-6. En Banc. July 30, 1981.]

GENE PETERS, *Petitioner*, v. LES N. SJOHOLM, ET AL, *Respondents*.

[1] **Taxation — Collection — Seizure of Bank Account — Validity.** Neither state nor federal constitutional rights are violated by the seizure by a taxing agency of a commercial bank account to satisfy a tax indebtedness of the depositor if the agency complies with relevant statutes and has probable cause to believe the bank funds belong to the taxpayer.

[2] **Taxation — Collection — Summary Enforcement — Due Process.** Due process permits a government, in its sovereign authority, to collect taxes in a summary fashion if, at some point during the proceeding, the taxpayer is given notice and has an opportunity to be heard, and if the applicable statutory procedure is substantially followed.

[3] **Jury — Taxation — Action Challenging — Right to Jury.** There is no right to trial by jury in a challenge to the imposition and collection of taxes.

BRACHTENBACH, C.J., and ROSELLINI, J., concur by separate opinion; DORE and DIMMICK, JJ., did not participate in the disposition of this case.

Nature of Action: A taxpayer sued a state official and a commercial bank alleging violation of constitutional rights in the seizure of a bank account to satisfy a tax debt.

Superior Court: The Superior Court for Pierce County, No. 255298, Stanley W. Worswick, J., on April 13, 1978, entered a summary judgment in favor of the defendants.

Court of Appeals: Holding that there was no unreasonable search and seizure, the court *affirmed* the judgment at 25 Wn. App. 39.

Supreme Court: Holding that no constitutional violation occurred and that the taxpayer had no right to a jury trial, the court *affirms* the Court of Appeals and the trial court.

Richard F. DeJean, for petitioner.

Slade Gorton, Attorney General, and *Greg Montgomery*,

Assistant, for respondents.

UTTER, J.—The Department of Revenue seized petitioner's bank account as payment for delinquent taxes under RCW 82.32.210, .220 and .235. The trial court granted a summary judgment in favor of the State and the Court of Appeals, Division Two, upheld that action. We affirm.

Following an audit of petitioner Gene Peters' business, the Department found him delinquent in his excise taxes in the amount of $1,505.14. The Department issued a tax assessment for the delinquency and mailed a copy to petitioner. RCW 82.32.050. When Peters failed to satisfy the delinquency, the Department issued a tax warrant, under its official seal, against Peters commanding the sheriff of Lewis County to levy upon any of petitioner's property. RCW 82.32.210.

Peters petitioned the Department for review of its assessment decision. RCW 82.32.160. After a conference with Peters, the Department ruled its earlier decision was correct and ordered the compliance division of the Department to collect the tax warrants. These warrants had been filed in the Superior Court for Lewis County under RCW 82.32.220, and created a lien upon Peters' property. *State v. Hi-Lo Foods, Inc.*, 62 Wn.2d 534, 383 P.2d 910 (1963); *Weitz v. Electrovation, Inc.*, 48 Wn.2d 604, 295 P.2d 728 (1956).

In addition the Department, through its employee, respondent Les N. Sjoholm, served upon petitioner's bank, Puget Sound National Bank, a notice and order to withhold and deliver. RCW 82.32.235. Under this order, the bank was required to deliver to the Department any property belonging to Peters. The bank sent the Department a check for $89.98, which represented the funds in Peters' account.

Peters commenced this action against Sjoholm and Puget Sound National Bank on the grounds that the seizure of his bank account was an unwarranted search and seizure in contravention of both the state and federal constitutions; and that the seizure violated the fundamental requirements

of due process. The trial court granted defendants' motion for summary judgment, and the Court of Appeals affirmed.

Petitioner first contends that the seizure of funds from his bank account violated the fourth amendment to the United States Constitution and article 1, section 7 of the Washington State Constitution. We find it unnecessary to decide this issue to dispose of this case.

The applicability of the Fourth Amendment to bank deposits is unclear. In *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 50 L. Ed. 2d 530, 97 S. Ct. 619 (1977), the Internal Revenue Service (IRS) seized a taxpayer's bank account. The district court held it was constitutional, but the Supreme Court did not address that aspect of the case. The court, however, did state that the full panoply of Fourth Amendment protections applies to IRS seizures which intrude upon a taxpayer's privacy. As for all other IRS seizures, the court implied that there must only be probable cause that the seized items belong to the taxpayer.

The subsequent case law is divided as to whether that means the Fourth Amendment applies only to seizures made on the taxpayer's private premises, *see Brunwasser v. Jacob*, 453 F. Supp. 567 (W.D. Pa. 1978), or whether it applies generally to all IRS seizures regardless of where made. *See United States v. One 1975 Pontiac Lemans*, 621 F.2d 444 (1st Cir. 1980). The disagreement stems from the court's abbreviated treatment, and approval, of the IRS seizure of vehicles in public places. The court stated that if there is probable cause to believe that such a vehicle belongs to the taxpayer, the IRS may seize it without a warrant. Because the court did not require the existence of any exigent circumstances (which the Fourth Amendment has been read to require in other contexts involving the seizure of parked cars), some courts have said the Fourth Amendment must not apply to seizures unless conducted on the taxpayer's private premises. *See Jacob*; and *One 1975 Pontiac Lemans*.

Such a conclusion is buttressed by *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.)

272, 15 L. Ed. 372 (1856), the case relied upon extensively by *G.M. Leasing*. *Murray* stated that the Fourth Amendment does not apply to civil proceedings for the recovery of debts. If that is the law, the probable cause requirement for all seizures may be explainable as mandated by due process, rather than the Fourth Amendment. *G.M. Leasing*, at 252.

There are several possible justifications why the Fourth Amendment should apply only to seizures involving the taxpayer's private premises, and not seizures of bank deposits. One is that once the tax assessment and subsequent levy activity begin, the government in effect becomes a co-owner in the property to be seized. *See United States v. Bluhm*, 414 F.2d 1240 (7th Cir. 1969), and cases cited therein. At that point, the government is presumptively entitled to it. *One 1975 Pontiac Lemans*, at 450. Thus, the taxpayer's expectation of privacy in that property is reduced once she/he becomes aware that it is subject to levy. Such is, in part, the analysis used in *State v. McCray*, 15 Wn. App. 810, 551 P.2d 1376 (1976). The court condoned a call by the police to a bank for the purpose of ascertaining the status of an account in which a bad check had been drawn, because

> It seems clear to us that a person who writes or passes a bad check drawn on his or her bank account cannot have any justifiable expectation that the status of the account at that time will remain private.

State v. McCray, *supra* at 816. That same analysis could be applied to this case.

A possible second justification is that the government's strong interest in collecting its taxes overrides the taxpayer's interest in the seized property. *G.M. Leasing*, at 352; *One 1975 Pontiac Lemans*, at 450. The government may intrude upon a person's privacy when its interest is stronger than the individual's right of privacy. *See State v. Lesnick*, 84 Wn.2d 940, 942, 530 P.2d 243 (1975). In the case of tax seizures, the government has a strong interest in preventing the property from being removed before it can

be seized. This could be a problem if the government had to fully comply with the Fourth Amendment requirements.

On the other hand, the individual's interest in the property can be adequately protected by a postseizure hearing, which is required by statute or due process. *See Ingraham v. Wright*, 430 U.S. 651, 696, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977) (interpreting *G.M. Leasing*). In the individual's case, any injury to the taxpayer as a result of an improper seizure can be remedied after the fact. Moreover, the taxpayer has only a minimal expectation of privacy in his or her bank deposits. Once money is deposited in a general bank account, title to the money passes to the bank, and the bank and the depositor assume the relationship of debtor and creditor, respectively. *Carlson v. Kies*, 75 Wash. 171, 134 P. 808 (1931); *Allied Sheet Metal Fabricators, Inc. v. Peoples Nat'l Bank*, 10 Wn. App. 530, 518 P.2d 734 (1974). It thus has been stated that since the depositor exerts neither an ownership nor a possessory interest in the funds, he or she has no legitimate expectation of privacy in the funds themselves and no interest protected by the Fourth Amendment. *See United States v. Miller*, 425 U.S. 435, 48 L. Ed. 2d 71, 96 S. Ct. 1619 (1976);[1] *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). Similarly, although the depositor does have an ownership interest in the indebtedness created by the deposit, such an interest may not create, in light of society's strong interest in tax collection, an expectation of privacy which society is prepared to recognize as legitimate for Fourth Amendment purposes. *Katz*, at 361–62. *See also Rakas v. Illinois*, 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978).

In contrast, some courts, without any analytical elaboration, believe the Fourth Amendment does apply to seizures of the taxpayer's funds; at least to the extent of requiring

[1]In *Miller*, the United States Supreme Court held that bank records, including checks, deposit slips and bank statements, do not come within the protection of the Fourth Amendment. This decision, however, is not dispositive of the case at bench.

the presence of probable cause. *Flores v. United States*, 551 F.2d 1169 (9th Cir. 1977); *Brunwasser v. Jacob*, *supra*. In *Flores*, the court disapproved of an IRS seizure of money from a bail bondsman, because the IRS lacked probable cause to believe it belonged to the delinquent taxpayer. In *Jacob*, the IRS was allowed to levy on property held by a bank.

The argument for applying the Fourth Amendment to seizures of bank accounts is that such a seizure extinguishes the bank's obligation to pay that sum to the taxpayer. "[P]ayment to the Government pursuant to levy and notice is a complete defense" to any subsequent claim by the taxpayer. *DiEdwardo v. First Nat'l Bank of Bath*, 442 F. Supp. 499, 500 (E.D. Pa. 1977). To this extent, the taxpayer has a form of ownership interest in the debt owed him/her by the bank. Ownership interests are generally sufficient to invoke the Fourth Amendment's prohibition against unreasonable searches. An individual "who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas v. Illinois*, *supra* at 144 n.12.

[1] We however need not decide whether the Fourth Amendment, or its counterpart in our state constitution, applies to seizures of bank deposits. The cases agree as to what procedure must be followed for a seizure of a bank account to be valid, although they may disagree as to which constitutional provision requires it. The agency must have probable cause to believe that the bank fund belongs to the taxpayer. *See, e.g., Flores v. United States*, *supra* at 1174–75. It, however, does not need an ordinary search and seizure warrant. *See Flores v. United States*, *supra*; *Brunwasser v. Jacob*, *supra*. The probable cause requirement exists, regardless of whether the Fourth Amendment applies, because of due process. *See G.M. Leasing Corp. v. United States*, *supra*. The tax agency, therefore, may seize bank funds when it complies with the relevant statutes and has probable cause to believe the bank funds belong to the taxpayer.

[2] To ensure the speedy and effectual collection of taxes, the government may, under its inherent sovereign power, assess and collect taxes in a summary fashion. *G.M. Leasing Corp. v. United States, supra; Phillips v. Commissioner*, 283 U.S. 589, 596–97, 75 L. Ed. 1289, 51 S. Ct. 608 (1931); *State ex rel. Mulhausen v. Superior Court*, 22 Wn.2d 811, 817, 157 P.2d 938, 160 A.L.R. 692 (1945). This summary method of collection does not violate the requirement of due process if, at some point during the proceedings, the taxpayer "is given notice and has an opportunity to be heard, and if the procedure established by existing law is substantially followed in assessment and collection". *State ex rel. Mulhausen, supra* at 817. *See also G.M. Leasing; Fuentes v. Shevin*, 407 U.S. 67, 90–92, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972).

In the case at bench, the Department utilized a summary method of collection in response to Peters' tax delinquency. Due process was satisfied, however, in that it followed the procedures established under RCW 82.32, and gave Peters notice of the tax assessed against him, and afforded Peters an administrative hearing on the matter of his tax liability.

Moreover, petitioner had the opportunity to challenge the tax assessment after the taxes had been paid. He could have applied for a refund and for a conference to examine and review the tax liability, RCW 82.32.170, or appealed to the Superior Court for Thurston County for a refund, RCW 82.32.180. In the area of tax collection, it is constitutionally sound to postpone the opportunity for a hearing until after the payment of the delinquent taxes. *See Fuentes v. Shevin, supra* at 91–92.

[3] Lastly, petitioner claims that he is entitled to a jury trial prior to the imposition and enforcement of any tax liability. There is no such right to a trial by jury. *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 116 P.2d 507 (1941).

We affirm the trial court's decision granting respondents'

motion for summary judgment.

STAFFORD, DOLLIVER, HICKS, and WILLIAMS, JJ., concur.

BRACHTENBACH, J. (concurring)—While I agree with the result of the majority, my analysis differs. I conclude that the government's levying of private bank accounts constitutes a "search and seizure" for the purposes of the fourth amendment of the United States Constitution and a "disturbance" or "intrusion" in Const. art. 1, § 7 terms.[2] These constitutional provisions were not violated, however, because the government actions were reasonable under the circumstances of this case. Petitioner also was accorded all rights owed him under the due process clause.

As a preliminary matter, note the context in which the challenged conduct occurred. Funds from Peters' personal checking account were transferred to the Department of Revenue as required by a notice to withhold and deliver to satisfy a delinquent tax assessment. RCW 82.32.235. The government's taking of the money was not to gather evidence, remove instrumentalities or return fruits of a crime. Nor was the subject tax warrant issued by a neutral magistrate, but by the Department of Revenue. RCW 82.32.210. In addition, the petitioner does not seek the exclusionary remedy. Because these circumstances are atypical, the standard search and seizure tests should be applied discriminately, in light of the values underlying the governing principles.

I

The history, purpose and applications of the Fourth Amendment require its application to government levies under RCW 82.32.235.

Among the provisions of the Bill of Rights, the Fourth Amendment's history is richest and most revealing of its

[2]Although these provisions "vary slightly in language, [they] are identical in purpose and substance", *State v. Miles*, 29 Wn.2d 921, 926, 190 P.2d 740 (1948); *State v. Smith*, 88 Wn.2d 127, 559 P.2d 970 (1977), and will be discussed as one in this opinion.

intended effect. J. Landynski, *Search and Seizure and the Supreme Court* 19 (1966). The abuses of tax collectors and customs officers in England and colonial America were of central concern to the framers of our federal constitution. Their intrusions under the power of general warrants and writs of assistance were particularly despised. T. Taylor, *Two Studies in Constitutional Interpretation* 41 (1969). The writs in this country were used to search for and seize goods smuggled to evade the revenue laws. Taylor, at 35. Like the RCW 82.32.210 tax warrant in the present case, they were: (1) issued by executive, not judicial, authority, (2) indefinite as to the time or place of seizure, and (3) silent as to which assets were subject to attachment.

The amendment received little judicial attention before the landmark decision in *Boyd v. United States*, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524 (1886). The issue before that court was whether the government could require production of documents by defendants in a forfeiture proceeding. While declaring that the Fourth Amendment scrutinizes such nonliteral "seizures", the underlying principles of the protection were announced:

> It is not the breaking of [a person's] doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, . . .

Boyd, at 630; *United States v. Chadwick*, 433 U.S. 1, 11 n.6, 53 L. Ed. 2d 538, 97 S. Ct. 2476 (1977).

In *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) the court again went beyond the conceptual traditions of Fourth Amendment law in extending coverage to prevent warrantless eavesdropping on conversations in a public phone booth. Because "the Fourth Amendment protects people, not places", the court reasoned that it therefore protects "what [an individual] seeks to preserve as private, even in an area accessible to the public". *Katz*, at 351. Because the *Katz* rule has been mod-

ified somewhat to emphasize "legitimate expectations" arising from interests in property, *Rakas v. Illinois*, 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978), the underlying concept more clearly applies.

For example, the Supreme Court has extended the amendment's coverage to possessions which are stored for safety and security outside of an individual's premises. In *United States v. Chadwick, supra*, federal authorities removed and subsequently opened a locked footlocker from the scene of a drug arrest at a public train station. The court ruled that the owner's Fourth Amendment privacy interests were implicated.

> By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.

United States v. Chadwick, supra at 11.

Similarly, citizens manifest an important expectation of privacy by depositing their money in the local bank. Because they alone can control the disposition of their funds, people rely on this security, just as they would if the cash were stashed in their own mattresses. By moving money to the bank for the purpose of security, it cannot be said that "[t]he right of the people to be secure in their persons, houses, papers, and effects, . . ." (U.S. Const. amend. 4) and the protection of privacy due therefrom, evaporates.

Katz exemplified what is at times the functional specific protection of the amendment. *Katz* was protected against unreasonable "seizure" of his voice through eavesdropping, but was unprotected against visual observance through the glass walls of the booth. *Katz*, at 352. So too should bank depositors be secure that their money will not be removed unreasonably, that they will maintain exclusive control over its disposition, while the information regarding its presence

and value can be disseminated by the bank without implicating the amendment. *United States v. Miller*, 425 U.S. 435, 48 L. Ed. 2d 71, 96 S. Ct. 1619 (1976).

In *United States v. Miller, supra*, the court ruled that bank depositors have no legitimate expectation of privacy in copies of their checks, deposit slips and bank statements. Therefore, there was no Fourth Amendment search and seizure when the bank revealed this information to federal authorities. The decision was based on: (1) the absence of an ownership or possessory interest in the items seized, (2) the public character of the information, after being passed through commercial channels, and (3) the voluntary nature of the disclosure of this information. *Miller* is distinguishable from this case. Its much criticized rationale should not be extended to erode protections against government removal of private funds in bank accounts. *See Miller*, at 447–56 (Brennan, J., and Marshall, J., dissenting); 1 W. LaFave, *Search and Seizure* 411 (1978); Hufstedler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. Pa. L. Rev. 1483 (1979); Comment, *A Bank Customer Has No Reasonable Expectation of Privacy of Bank Records: U.S. v. Miller*, 14 San Diego L. Rev. 414 (1977); Comment, *Government Access to Bank Records in the Aftermath of United States v. Miller and the Tax Reform Act of 1976*, 14 Hous. L. Rev. 636 (1977).

Money in a bank account might be an individual's most important possession. In exchange for it all goods and services necessary to live are commonly procured. Technical characterization of the funds as a "debt" for purposes of banking law should not affect the constitutional protection one is given as the majority and *Miller* suggest. *Katz* specifically rejected traditional rules regarding ownership as boundaries of Fourth Amendment scrutiny. *Katz*, at 352–53. *Cf. Rakas v. Illinois, supra* at 142 (tort and property law characterizations rejected as a boundary for Fourth Amendment rights). In any event, depositors have a significant property interest as a demand creditor, *Aberdeen v.*

National Sur. Co., 151 Wash. 55, 275 P. 62, 65 A.L.R. 794 (1929), and the Fourth Amendment clearly protects more than tangible property. *Warden v. Hayden*, 387 U.S. 294, 304, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967), *Wong Sun v. United States*, 371 U.S. 471, 484–86, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). Most importantly, the characterization is irrelevant because it is reasonable to expect that this property, which is so intimately tied with one's identity and welfare, will be under one's exclusive control. This power to exclude others can give rise to a "legitimate expectation of privacy" which warrants protection. *Rakas v. Illinois*, *supra* at 144 n.12.

The funds were not made public thereby destroying its private nature as were the checks and bank records in *Miller*. While the bank is a public reporting vehicle of deposit information, *Miller*, at 442–43, it performs no such function of appropriating funds.

People often have little choice but to place their money in a bank. The California State Supreme Court has stated:

> For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. . . . To permit a police officer access . . . merely upon his request, without any judicial control as to relevancy or other traditional requirements of legal process . . . opens the door to a vast and unlimited range of very real abuses of police power.

Burrows v. Superior Court, 13 Cal. 3d 238, 247, 529 P.2d 590, 118 Cal. Rptr. 166 (1974); *See* Comment, *Government Access to Bank Records*, 83 Yale L.J. 1439 (1974). That court confronted the same issue posed in *Miller*, but unanimously ruled that individuals do have a protected privacy interest in their bank account records. Division One of our Court of Appeals agrees. *State v. McCray*, 15 Wn. App. 810, 551 P.2d 1376 (1976) (decided before *Miller*).

The majority suggests that once a tax assessment and levy are made, the government becomes a co–owner of the property, thereby extinguishing the depositor's legitimate

expectations of privacy. Because the RCW 82.32.210 levy power is created before any piece of property is identified, does that mean that a delinquent taxpayer cannot expect privacy in any of his/her assets? Does the government become co-owner of everything he/she owns? *McCray* held that one who knowingly passed bad checks should legitimately expect less privacy in that checking account. Here the account had no relation to the basis for the government's claim against the taxpayer.

Even if one's "expectations of privacy" were somewhat diminished, it would be misleading to focus too narrowly on this phrase. *Katz* specified that the Fourth Amendment protects more than just one's "right to privacy". *Katz*, at 350. Neither are expectations always an accurate gauge of Fourth Amendment protections. For example, in a high crime area citizens may have no reasonable expectation that their new cars parked on the street will remain unmolested. Should the Fourth Amendment offer any less protection against the police breaking into those cars because their owners expected no better? Do Fourth Amendment protections diminish as perceptions of revenue agent intrusion and abuses become widespread? The central question becomes one of values.

> It is whether, if [seizure of taxpayer's bank funds by revenue agents before a judicial determination of liability] is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.

Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 403 (1974).

Many persons' social security, pension, and welfare checks are mailed to and deposited in their bank accounts on a regular basis. Their survival would be jeopardized if those funds were unreasonably seized. Because of the centrality of the bank account in our lives, it is entirely consistent with Fourth Amendment traditions and values to hold that unreasonable government searches and seizures

thereof are forbidden.

II

Once it is determined that the Fourth Amendment applies "[o]ur fundamental inquiry . . . is whether or not a search or seizure is reasonable under all the circumstances. *Cooper v. California*, 386 U. S. 58 (1967)" *United States v. Chadwick*, *supra* at 9. *Delaware v. Prouse*, 440 U.S. 648, 653–54, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979); *State v. Henneke*, 78 Wn.2d 147, 470 P.2d 176 (1970). In most cases a warrant is required to insure that a search and seizure is reasonable. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352–53, 50 L. Ed. 2d 530, 97 S. Ct. 619 (1977).

In this case there were two stages at which a neutral magistrate might have scrutinized the Department of Revenue's actions if a warrant were required. First, a magistrate could have demanded that tax authorities show that the taxes assessed to Peters were legitimately owed. Second, a magistrate could have required a showing of probable cause that Peters' assets were in the bank to which the notice and order to withhold and deliver was directed.

The determination of the existence of a tax liability is the most crucial stage for the taxpayer. In this case Peters was notified of the deficiency, RCW 82.32.050, and given an administrative conference to review the assessment decision. RCW 82.32.160. Peters also had the opportunity to seek review of the administrative determination in court, although after payment of his tax. RCW 82.32.180. By interposing a magistrate into the tax assessment and collection procedure before the seizure the taxpayer would gain little additional protection. Where the government tax assessment gains the force of a judgment by filing the tax warrant with the clerk of court, RCW 82.32.220, a magistrate would have no basis upon which to reject a warrant application. *United States v. One 1975 Pontiac Lemans*, 621 F.2d 444, 453 (1st Cir. 1980). To require a judicially authorized warrant in such cases, therefore, would serve no useful function.

A warrant might require a showing that the assets claimed by the government are in a particular bank. The summary collection statute already requires the Department to have "reason to believe that there is in the possession of such person" assets owed the taxpayer. RCW 82.32.235. Requiring a detached magistrate to insure that such belief exists would not affect this taxpayer's Fourth Amendment interests. If no probable cause exists and no assets are present, Peters' privacy is undisturbed. If by chance his assets are in the bank to which notice is given, the taxpayer is no worse off.[3] Requiring a judicial warrant at this stage, under these facts, would create a worthless administrative burden. As the Supreme Court has said in the context of

> noncriminal inventory searches, where probable cause to search is irrelevant, . . . ". . . search warrants are not required, linked as the warrant requirement textually is to the probable-cause concept." *South Dakota v. Opperman*, 428 U. S. 364, 370 n. 5 (1976). This is so because the salutary functions of a warrant simply have no application in that context; the constitutional reasonableness . . . must be determined on other bases.

United States v. Chadwick, 443 U.S. 1, 10 n.5, 53 L. Ed. 2d 538, 97 S. Ct. 2476 (1977).

The standard for judging the reasonableness of a warrantless search and seizure is to balance "the need to search [or seize] against the invasion which the search [or seizure] entails." *Camara v. Municipal Court*, 387 U.S. 523, 537, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967). *See United States v. Ramsey*, 431 U.S. 606, 616–19, 52 L. Ed. 2d 617, 97 S. Ct. 1972 (1977).

The government has a strong interest in the efficient collection of taxes which has long been recognized by the judiciary. *Phillips v. Commissioner*, 283 U.S. 589, 596–97, 75 L. Ed. 1289, 51 S. Ct. 608 (1931); *G.M. Leasing Corp. v. United States, supra; State ex rel. Mulhausen v. Superior*

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[3]Whether or not the Fourth Amendment rights of the bank or other parties might be compromised is a separate issue.

Court, 22 Wn.2d 811, 817, 157 P.2d 938, 160 A.L.R. 692 (1945). This interest is specifically enunciated in the "power to lay and collect taxes". U.S. Const. art. 1, § 8. *See* Const. art. 7. While the government did not need to collect the $89 immediately, it already had given the taxpayer years to satisfy the deficiency voluntarily.

Because money in bank accounts is fungible, there is no damage to the specific property taken. While removing assets from a checking account without warning could cause outstanding checks to be returned for insufficient funds or otherwise cause cash flow hardships, this plaintiff knew months in advance of his tax deficiency so could have protected against this possibility. As previously stated, plaintiff was given an administrative hearing at which time he presented evidence in his behalf. This preseizure hearing is, in fact, more meaningful than an ex parte warrant proceeding before a neutral magistrate would be. In addition, because the levy occurred away from plaintiff's home or office, the intrusion into his security and privacy is somewhat lessened. *Payton v. New York*, 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980). In balance, the levy was reasonable.

By removing Peters' bank funds the Department also effected a taking of property, subject to Fifth and Fourteenth Amendment due process protection. It is recognized that in the context of tax seizures away from the taxpayer's premises, the constitutional balances for determining due process and Fourth Amendment protection are similar. *G.M. Leasing Corp. v. United States, supra* at 352 n.18.

I concur with the majority's finding that the Department's procedures comported with due process. *See Commissioner v. Shapiro*, 424 U.S. 614, 630–33, 47 L. Ed. 2d 278, 96 S. Ct. 1062 (1976).

III

Finding that the Fourth Amendment applies while offering no protections beyond those already required by due process, questions are legitimately raised as to the import

of the holding.

First, the Fourth Amendment's warrant requirement should be understood as a preventative mechanism for protecting Fourth Amendment rights rather than a limitation on the coverage of the amendment. The fact that the probable cause/neutral magistrate requirement has little meaning in the context of an administrative determination filed with the court which is given a presumption of correctness, should not dictate the bounds of the interests protected against unreasonable search and seizure.

Second, because bank accounts are centrally tied to persons' welfare, unreasonable tampering could give rise to a constitutional action in tort, as in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971). The Fourth Amendment would protect against an RCW 82.32.235 notice to withhold and deliver which exceeded the amount of the claimed deficiency, *cf. United States v. Dionisio*, 410 U.S. 1, 35 L. Ed. 2d 67, 93 S. Ct. 764 (1973) (condemning grand jury subpoena's too sweeping in its terms "to be regarded as reasonable").

The Fourth Amendment's standard of "reasonableness" might provide more protection before a search and seizure than the due process clause, which allows government seizure of taxpayers' assets without a preseizure hearing. *Fuentes v. Shevin*, 407 U.S. 67, 92, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). Because of the orientation of the Fourth Amendment towards preventing unreasonable searches and seizures before they occur, as evidenced by its usual warrant requirement, the provision might require a prior administrative hearing as was given Peters.

Therefore, an unreasonable denial of an assessment conference, RCW 82.32.160 might give rise to a Fourth Amendment violation. Without this hearing at which he appeared and presented evidence, levying Peters' bank account without the involvement of a neutral magistrate might have been unreasonable and in violation of the con-

stitution.

ROSELLINI, J., concurs with BRACHTENBACH, C.J.

Reconsideration denied January 22, 1980.

Review denied by Supreme Court March 21, 1980.

[No. 3435-II. Division Two. December 27, 1979.]

GENE M. PETERS, *Appellant*, v. LES N. SJOHOLM, ET AL, *Respondents*.

[1] **Banks and Banking — Deposits — Status.** Funds deposited in a general account of a bank become the property of the bank, and the bank and the depositor assume the legal relation of debtor and creditor.

[2] **Taxation — Searches and Seizures — Banks and Banking — Deposits — Tax Seizure — Validity.** The seizure of funds deposited in a commercial bank account to satisfy a tax indebtedness of the depositor does not violate the constitutional prohibition against unreasonable searches and seizures.

[3] **Taxation — Tax Liability — Judicial Proceeding — Due Process.** The power to require payment of taxes may be exercised without a judicial proceeding. Such a summary procedure does not violate due process.

Nature of Action: A taxpayer contended that seizure of funds from his bank account by the State under a tax warrant judgment was unconstitutional as violating his right to be free from unreasonable searches and seizures and his right to a jury trial.

Superior Court: The Superior Court for Pierce County, No. 255298, Stanley W. Worswick, J., on April 13, 1978, entered a summary judgment of dismissal in favor of the defendants.

Court of Appeals: Holding that summary tax collection procedures were constitutional and that the taxpayer

had no right to a jury trial to determine his tax liability, the court *affirms* the judgment.

Richard F. DeJean, for appellant.

Slade Gorton, Attorney General, Greg Montgomery, Assistant, and *W. Gerald Lynch*, for respondents.

PETRIE, J.—Gene M. Peters appeals from a summary judgment dismissing his complaint which had contended that defendant Sjoholm, as an agent of the Department of Revenue of the State of Washington, and defendant Puget Sound National Bank violated his federal and state constitutional right to be free from unreasonable searches and seizures when the bank, in compliance with a notice and order to withhold and deliver issued by the department and served upon the bank, paid $89.98 from his account to the department. He also contends that the department has no authority to establish and to attempt collection of his tax liability without first having that determination made by the judiciary through a jury trial. We disagree with both contentions, and affirm the judgment of the trial court.

On October 6, 1975, the department audited Peters' business and discovered that his excise taxes (*i.e.*, use tax on inventory) were delinquent in the amount of $1,501.14. The department issued a tax assessment for the delinquency, and a copy was mailed to Peters. When he failed to remit the amount assessed, the department issued a tax warrant against him, commanding an agent of the department (1) to file a copy with an appropriate county clerk and (2) to levy upon personal property of the taxpayer. *See* RCW 82.32.210 and .230. Subsequent to the issuance of this warrant, Peters petitioned the department for a conference on the question of his tax liability. Notwithstanding the tardiness of the request, the department granted it, and, after a hearing, chose to abide by its original determination. Accordingly, the compliance division was directed to proceed with collection under the tax warrant.

Thereafter, the tax warrant was filed in Superior Court for Lewis County, creating a judgment of record and a lien upon Peters' property. *State v. Hi-Lo Foods, Inc.*, 62 Wn.2d 534, 383 P.2d 910 (1963); *Weitz v. Electrovation, Inc.*, 48 Wn.2d 604, 295 P.2d 728 (1956). Then, utilizing an alternative collection process under the authority of RCW 82.32.235,[1] the department, through defendant Sjoholm, one of its compliance agents, served a notice and order to withhold and deliver upon the bank. The notice indicates on its face both the tax warrant number and the Lewis County judgment number. The bank delivered to the department a check in the amount of $89.98, representing the funds in Peters' account. Peters then commenced this action.

First, Peters claims that the delivery of the funds in his bank account to the department, and the department's use of that statutory procedure, violated his rights under the fourth amendment to the United States Constitution,[2] and

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[1]RCW 82.32.235 provides in part:

"In addition to the remedies provided in this chapter the department is hereby authorized to issue to any person, or to any political subdivision or department of the state, a notice and order to withhold and deliver property of any kind whatsoever when there is reason to believe that there is in the possession of such person, political subdivision or department, property which is or shall become due, owing, or belonging to any taxpayer against whom a warrant has been filed.

. . .

"In the event there is in the possession of any such person or political subdivision or department, any property which may be subject to the claim of the department, such property shall be delivered forthwith to the department of revenue or its duly authorized representative upon demand to be held in trust by the department for application on the indebtedness involved or for return, without interest, in accordance with final determination of liability or nonliability, or in the alternative, there shall be furnished a good and sufficient bond satisfactory to the department conditioned upon final determination of liability."

[2]The fourth amendment to the United States Constitution reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

article 1, section 7 of the Washington State Constitution.[3] He relies principally on a statement in *State v. McCray*, 15 Wn. App. 810, 551 P.2d 1376 (1976), in which the court agreed with the basic premise of *United States v. Miller*, 500 F.2d 751 (5th Cir. 1974), and *Burrows v. Superior Ct.*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1975), that "[a] person's bank account *is* protected against unwarranted searches and seizures by our federal and state constitutions." *State v. McCray, supra* at 814.

In *Miller*, a government agent viewed microfilm copies of all the checks in Miller's account at a bank, and took copies of one deposit slip and one or two checks. The prosecution introduced several of these copies at trial to help prove three of the overt acts charged against Miller in furtherance of a conspiracy. The United States Court of Appeals held that obtaining these copies with a faulty subpoena constituted an unlawful invasion of Miller's privacy. In *Burrows*, the California court followed the reasoning of *Miller* in holding that any bank statements or copies thereof obtained without the benefit of legal process were acquired as the result of an illegal search and seizure.

However, the United States Supreme Court has reversed the Fifth Circuit's holding in *Miller*. *United States v. Miller*, 425 U.S. 435, 48 L. Ed. 2d 71, 96 S. Ct. 1619 (1976). In *Miller* at 442–43, the Supreme Court stated:

> Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of

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[3]Article 1, section 7 of the Constitution of the State of Washington reads:
"No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." 12 U. S. C. § 1829b (a)(1). Cf. *Couch v. United States* [409 U.S. 322, 34 L. Ed. 2d 548, 93 S. Ct. 611 (1973)], *supra*, at 335.

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.

In view of the reasoning of the United States Supreme Court, the court's statement in *McCray*, that a person's bank account is protected against unwarranted searches and seizures, is of doubtful validity insofar as those protections are guaranteed by the federal constitution. Nevertheless, a state may impose a higher standard on searches and seizures than is required by the federal constitution, *State v. Hehman*, 90 Wn.2d 45, 578 P.2d 527 (1978); however, the *McCray* court did not expressly state or imply that it was imposing a higher standard than was guaranteed by the fourth amendment to the United States Constitution. Neither do we impute any greater protection or significance to article 1, section 7 of the Washington State Constitution than we are obliged to provide under the fourth amendment to the United States Constitution.

[1, 2] Peters also asserts, however, that this case can be distinguished from *Miller* because the case at bench involved the seizure of *funds* rather than a search and seizure of his checks, deposit slips, and bank statements. The assertion raises the question of whether a person has a reasonable expectation of privacy in the funds in his account. We are convinced that he does not.

In *Miller*, the United States Supreme Court found no reasonable expectation of privacy in the defendant's checks and deposit slips, even though it is very likely that they revealed much about Miller's activities, associations, and

beliefs. We know that they helped prove the conspiracy charge.

In the case at bench, the department received a check for $89.98 from the bank, representing the funds in Peters' account. This would merely reveal that he had such a sum in his account and nothing more. Furthermore, once money is deposited in a general account it actually becomes the property of the bank, and the bank and the depositor assume the legal relation of debtor and creditor. *Carlson v. Kies*, 75 Wash. 171, 134 P. 808 (1913); *Allied Sheet Metal Fabricators, Inc. v. Peoples Nat'l Bank*, 10 Wn. App. 530, 518 P.2d 734 (1974). It would be inconsistent to say that Peters has a reasonable expectation of privacy in the *funds* in an account at a bank which is indebted to him for the amount of those funds, when he does not have a reasonable expectation of privacy in checks, deposit slips, and bank statements which are capable of disclosing much more about his private life. Therefore, we hold that neither the bank nor Sjoholm violated his federal or state constitutional rights of freedom from an unreasonable search and seizure.

Peters' remaining assignment of error raises the question of whether a judicial proceeding is a necessary prerequisite in order to determine tax liability. He concedes that the weight of authority is against his assertion that tax liability should be established only through the judicial system. However, he contends that the United States Constitution "should have provided" him with the right to a jury trial in this matter. We can provide precious little relief on the basis of that presentation unless the constitution does expressly or impliedly provide a right to jury trial before any tax liability may be imposed and enforced.

[3] In *State ex rel. Mulhausen v. Superior Ct.*, 22 Wn.2d 811, 817-18, 157 P.2d 938, 160 A.L.R. 692 (1945) the court stated:

> It is inherent in the exercise of sovereign power to require taxes to be paid under summary process. *Miller v. Henderson*, 50 Wash. 200, 96 Pac. 1052; *Scottish*

Union & Nat. Ins. Co. v. Bowland, 196 U.S. 611, 49 L. Ed. 619, 25 S. Ct. 345. The taxpayer has no vested right in any particular process: If, at some stage of the proceedings, he is given notice and has an opportunity to be heard, and if the procedure established by existing law is substantially followed in assessment and collection, the requirements of the due process clause of the constitution are satisfied. 1 Cooley on Taxation (4th ed.) 329, § 143; 3 Cooley on Taxation (4th ed.) 2263, 2264, §§ 1118, 1119; *Reese v. Thurston County*, 154 Wash. 617, 283 Pac. 170; *Miller v. Henderson, supra; Scottish Union & Nat. Ins. Co. v. Bowland, supra; Palmer v. McMahon*, 133 U.S. 660, 33 L. Ed. 772, 10 S. Ct. 324; *McMillen v. Anderson*, 95 U.S. 37, 24 L. Ed. 335.

In the present case, Peters was given notice of the tax assessed against him and he was granted a full administrative hearing on the question of his tax liability. Furthermore, the procedures established by RCW 82.32 were adhered to by the department in both assessing and collecting the taxes. Peters advances no reason that would compel this court to require a jury trial as a prerequisite to determination and enforcement of his tax liability. As he recognized, the overwhelming weight of authority is against such a requirement. *See Wickwire v. Reinecke*, 275 U.S. 101, 72 L. Ed. 184, 48 S. Ct. 43 (1927); *Olshausen v. Commissioner*, 273 F.2d 23 (9th Cir. 1959); *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 116 P.2d 507 (1941).

Judgment affirmed.

PEARSON, C.J., and REED, J., concur.

Reconsideration denied January 23, 1980.

Review granted by Supreme Court May 7, 1980.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

GENE M. PETERS, Plaintiff, vs. LES N. SJOHOLM and "JANE DOE" SJOHOLM, husband and wife; and PUGET SOUND NATIONAL BANK, Defendants.	NO. 255 298 ORDER GRANTING DEFENDANTS LES N. SJOHOLM'S AND PUGET SOUND NATIONAL BANK'S MOTIONS FOR SUMMARY JUDGMENT OF DISMISSAL

This matter having come on for hearing before this Court, on motions of Defendants Les N. Sjoholm and Puget Sound National Bank, for Orders of Summary Judgment of Dismissal, with prejudice, of Plaintiff's Complaint as to Defendants Les N. Sjoholm and Puget Sound National Bank, and the Court, having read the memorandums and affidavits filed by the parties to these motions, and having heard argument and being thus fully advised in the matter, and it appearing that there is no genuine issue of material fact, and that Defendants Les N. Sjoholm and Puget Sound National Bank are entitled to judgment as a matter of law, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED That the motions of the Defendants are hereby granted and the Complaint of the plaintiff herein is hereby dismissed with prejudice.

DATED this 13 day of Apr., 1978.

/s/STANLEY W. WORSWICK
JUDGE

Presented by:

/s/ Greg Montgomery
Greg Montgomery
Assistant Attorney General
Attorney for Defendant Sjoholm

/s/ W. GERALD LYNCH
W. Gerald Lynch
Attorney for Defendant Puget
Sound National Bank

Approved as to Form and Notice of
Presentation Waived:

/s/ RICHARD F. DeJEAN
Richard F. DeJean
Attorney for Plaintiff

STATE OF WASHINGTON
DEPARTMENT OF REVENUE
OFFICE OPERATIONS DIVISION
OLYMPIA, WASHINGTON 98504

BEFORE THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON

COMPLIANCE SECTION

WARRANT NO.	DATE OF ISSUE	DISTRICT OFFICE	REGISTRATION NO.
165609	February 6, 1976	Olympia #4	J219 001 777

CLAIMANT

STATE OF WASHINGTON

VS.

TAXPAYER

Gene M. Peters
P.O. Box 1
Glenoma, WA. 98336 and the marital community composed of Gene M. Peters and Jane Doe Peters.

CAUSE NO.

SUMMARY OF LIABILITY:

WARRANT (For Unpaid Tax)

PERIOD	TAX	DELINQUENT PENALTY	AUDIT INTEREST	ADDITIONAL INTEREST	WARRANT PENALTY	TOTAL DUE
1-1-71 to 6-30-75	1,261.72	126.17	239.42	28.39	63.09	1,718.79

28

Based on Tax Assessment #87993 by Del Nichols

The State of Washington, through the Department of Revenue, to Wm. L. Pearson, or any other agent of the Department of Revenue:

WHEREAS, the taxpayer is indebted to the State of Washington in the amount of $1,718.79 for taxes, increases and penalties imposed under and by virtue of Chapters 82.04 through 82.32 RCW, for the period of 1-1-71 to 6-30-75, together with interest thereon at the rate of one percent for each thirty days or portion thereof from and after the date of this warrant; and

WHEREAS, the amount specified above became due more than fifteen days prior to the date of this warrant, or is hereby declared to be immediately due and payable for the reason that the Director of the Department of Revenue does believe that the tax or penalty specified above will not be paid when due;

29

NOW, THEREFORE, in the name of the State of Washington, you are commanded (1) to file a copy of this warrant with the Clerk of the Superior Court of a county in which you may find property of the taxpayer, and (2) to levy upon the personal property of said taxpayer to the total amount specified above, together with interest at the rate allowed by law to the date of said levy, and together with the cost of executing this warrant, and make sale thereof according to law, and to levy upon and seize any surety bond or other security conditioned upon payment by the taxpayer of taxes due the State of Washington, and if sufficient personal property and bonds or other security cannot be found, to satisfy said amount due out of the real property of said taxpayer.

WITNESS, the Department of Revenue of the State of Washington and the Seal of said Department, affixed on _____.

Richard L. Brady
ASSISTANT DIRECTOR

FORM REV 42 2421 (5-74)

TAXPAYER COPY

DATE 7/10-1-76

DEPARTMENT OF REVENUE—EXCISE TAX DIVISION

NOTICE AND ORDER TO WITHHOLD AND DELIVER

(Continuing Levy)

TO: Puget Sound National Bank
Morton Branch
Morton, Wa. 98356

REGISTRATION NO.
J 219 001 777

COUNTY	CAUSE NO.	WARRANT NO.		DATE OF JUDGMENT	JUDGMENT AMOUNT	AMOUNT DUE
Lewis	T85464	165609	Judgment 901	9/9/76	$1718.79	$1856.31

You are hereby notified that there is now due, owing and unpaid, to the State of Washington from the taxpayer whose name appears below, the sum of ——→ TOTAL AMOUNT DUE $ 1856.31

NOW, THEREFORE, you are hereby required to answer to the undersigned, a duly authorized representative of the Department of Revenue, at the office address listed below, within twenty days of the service of this Notice upon you, exclusive of the day of service, stating in writing and under oath in what amount, if any, you are or will become indebted to the above-named taxpayer, and what effects or property, if any, of said taxpayer you have in your possession or under your control which may be subject to the claim of the Department of Revenue, and you shall forthwith deliver the same to the Department of Revenue or its duly authorized representative above named, or in the alternative, furnish a bond satisfactory to the Department of Revenue conditioned upon final determination of liability. This Notice shall constitute a Continuing Levy until the Department shall issue its release. Checks or money orders should be made payable to "Department of Revenue, State of Washington".

YOU ARE NOTIFIED FURTHER That should you fail to make answer to this Notice within the time prescribed herein, it shall be lawful for the court to render judgment by default against you for the full amount claimed herein, together with costs, pursuant to section 11, chapter 28, Laws of 1963, Ex. Sess. (RCW 82.32.235).

IN THE MATTER OF THE
TAX WARRANT AGAINST
Gene N. Peters
Gene N. Peters Roofing Contractor
P.O. Box 1
Glenoma, Wa. 9[illegible]36 and the marital
community composed of Gene N. Peters
and Jane [illegible] Peters

Taxpayer.

T85464
Cause No.

DEPARTMENT OF REVENUE

BY _____
(Authorized representative)

Les H. Nicholm
[illegible] Officer
OFFICE ADDRESS

QUADRUPLICATE—Taxpayer's Copy.

Form REV 22 2436 (9-74)

State of Washington
Department of Revenue
FIELD OPERATIONS DIVISION
Audit Procedures & Review
Olympia, Washington 98504

Nº 87993

office use only

6-75
POSTING PERIOD

TAX ASSESSMENT

Name: Gene M. Peters
Firm:
Street Address: P.O. Box 1
City, State, Zip Code: Glenoma, Wa 98336

Registration No. T 219 001 777 32

Date November 6, 1975

Examination of your account for the period January 1, 1971 to June 30, 1975 discloses a balance of taxes, interest and penalties due which is hereby assessed under authority of the Revenue Act of 1935, as amended (RCW 82.32.050)

See ☑ Field Audit ☐ Partial Audit ☐ Supplemental Audit No.....
by Del Nichols dated October 6, 1975 and the following recapitulation for details. ☑ Audit attached ☐ Audit previously left with taxpayer

☐ See below.

DETAIL

Class	Gross Amount	Deductions	Taxable Amount	Rate	Tax

IMPORTANT

1. In order to insure proper credit to your account, return this assessment with your remittance.
2. Keep duplicate copy for your own files.
3. If this assessment cannot be paid on or before due date, contact the District Office of the Washington State Department of Revenue at:

1101 S Eastside St
P.O. Box 448
Olympia, Wa 98504

Corrected Tax Payable	$ 1,261.72
Audit Interest	$ 239.42
Total	$ 1501.14
Extension Interest	$
Penalty	$
Total	$ 1,501.14
	$
Total Due and Hereby Assessed	$ 1501.14

33

A penalty of 10% will be assessed if not paid on or before November 26, 1975

By M.L.

Routing: Two White copies to Taxpayer/Canary—Posting/Pink—Control.

FCAM REV 31 2416 (12-74)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GENE PETERS,	)
	)
Appellant,	) NO. 46865-6
	)
vs.	) NOTICE OF
	) APPEAL
LES N. SJOHOLM and JANE DOE SJOHOLM, his wife; and PUGET SOUND NATIONAL BANK,	)
	)
Appellees.	)
	)

NOTICE IS HEREBY GIVEN TO: LES N. SJOHOLM & JANE DOE SJOHOLM, his wife, and GREG MONTGOMERY, their attorney, and PUGET SOUND NATIONAL BANK, and W. GERALD LYNCH, its attorney:

that GENE PETERS, the appellant above named, hereby appeals to the Supreme Court of the United States from the decision of the Supreme Court of the State of Washington which became final on August 19, 1981.

/s/ JOHN A. STRAIT
Counsel for Appellant

82.32.210 Tax warrant—Levy upon property—Revocation of certificate of registration

If any tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the department of revenue may issue a warrant under its official seal directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county, or so much thereof as may be necessary, for the payment of the amount of such warrant, together with interest thereon at the rate of one percent of the amount of such warrant for each thirty days or portion thereof after the date of such warrant, plus the cost of executing the warrant, and return the warrant to the department of revenue and pay to it the money collected by virtue thereof within sixty days after the receipt of the warrant. If, however, the department of revenue believes that a taxpayer is about to cease business, leave the state, or remove or dissipate the assets out of which taxes or penalties might be satisfied and that any tax or penalty will not be paid when due, it may declare the tax or penalty to be immediately due and payable and may issue a warrant immediately.

If any warrant issued under this chapter is not paid within thirty days after it has been filed with the clerk of the superior court, or if any taxpayer shall, for three consecutive reporting periods, be delinquent in the transmission to the department of revenue of retail sales tax collected by him, the department of revenue may by order issued under its official seal, revoke the certificate of registration of the taxpayer against whom the warrant was issued, and, if such order is entered, a copy thereof shall be posted in a conspicuous place at the main entrance to the taxpayer's place of business and shall remain posted until such time as

the warrant has been paid. Any certificate so revoked shall not be reinstated, nor shall a new certificate of registration be issued to the taxpayer, until the amount due on the warrant has been paid, or provisions for payment satisfactory to the department of revenue have been entered, and until the taxpayer has deposited with the department of revenue such security for payment of any taxes, increases, and penalties, due or which may become due in an amount and under such terms and conditions as the department of revenue may require, but the amount of the security shall not be greater than one-half the estimated average annual liability of the taxpayer.

82.32.235 Notice and order to withhold and deliver property due or owned by taxpayer—Bond—Judgment by default

In addition to the remedies provided in this chapter the department is hereby authorized to issue to any person, or to any political subdivision or department of the state, a notice and order to withhold and deliver property of any kind whatsoever when there is reason to believe that there is in the possession of such person, political subdivision or department, property which is or shall become due, owing, or belonging to any taxpayer against whom a warrant has been filed.

The notice and order to withhold and deliver shall be served by the sheriff of the county wherein the service is made, or by his deputy, or by any duly authorized representative of the department. Any person, or any political subdivision or department upon whom service has been made is hereby required to answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice.

82.32.235

In the event there is in the possession of any such person or political subdivision or department, any property which may be subject to the claim of the department, such property shall be delivered forthwith to the department of revenue or its duly authorized representative upon demand to be held in trust by the department for application on the indebtedness involved or for return, without interest, in accordance with final determination of liability or nonliability, or in the alternative, there shall be furnished a good and sufficient bond satisfactory to the department conditioned upon final determination of liability.

Should any person or political subdivision fail to make answer to an order to withhold and deliver within the time prescribed herein, it shall be lawful for the court, after the time to answer such order has expired, to render judgment by default against such person or political subdivision for the full amount claimed by the department in the notice to withhold and deliver, together with costs.

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
DEC 30 1981
ALEXANDER L. STEVAS
CLERK

No. 81-840

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

GENE PETERS,

Appellant,

v.

LES J. SJOHOLM and JANE DOE SJOHOLM, his wife, and PUGET SOUND NATIONAL BANK,

Appellees.

On Appeal From the Supreme Court of the State of Washington

MOTION TO DISMISS OR AFFIRM

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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No. 81-840

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

GENE PETERS,

Appellant,

v.

LES J. SJOHOLM and JANE DOE SJOHOLM, his wife, and PUGET SOUND NATIONAL BANK,

Appellees.

On Appeal From the Supreme Court of the State of Washington

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellees move the Court to dismiss this appeal, or in the alternative, affirm the judgment of the Supreme Court of Washington on the ground that the questions on which the decision of the cause depends have been adequately addressed below and are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

The appeal is from collection of state business taxes following a statutory levy procedure. Appellant questions

the procedural safeguards afforded by the statute, and challenges the state's power to raise revenue through summary assessment.

The sole question[1] presented for review is whether, under all the circumstances, appellee's seizure of funds in appellant's bank account violated appellant's Fourth Amendment rights because appellee made the seizure by executing upon a judgment as authorized by statute, rather than upon a judicial warrant.

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. APPELLANT'S FOURTH AMENDMENT RIGHTS ARE NOT VIOLATED BY THE SUMMARY COLLECTION PROCEDURES EMPLOYED BY APPELLEE. ACCORDINGLY, THE HOLDING OF THE COURT BELOW IS CORRECT.

Summary tax collection procedures have long been held to meet the due process requirement of the Fifth and Fourteenth Amendments, in view of the overriding need of governments to raise revenue and the recognized traditional practice of summary tax assessment. *See Jurisdictional Statement,* page 7. The issue raised here is whether the seizure of appellant's funds, following a procedure which admittedly does not violate the due process requirements, is nevertheless unreasonable under the Fourth Amendment absent a warrant.

1. A search under the Fourth Amendment is not unreasonable if there is no violation of a legitimate expectation of privacy.

The legal setting in which this issue arises may be briefly stated. The Fourth Amendment prohibits

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[1]In the Court below, appellant raised due process claims under the Fifth and Fourteenth Amendments as well as the Fourth Amendment claim raised here. On appeal, appellant delinquent taxpayer raises only the question of whether the Fourth Amendment requires appellee Sjoholm, an agent of the State Department of Revenue, to obtain a judicial warrant before executing its judgment for taxes by a levy upon appellant's bank account.

unreasonable searches and seizures. An unreasonable search is one which is made without probable cause to believe that what is legitimately sought will actually be found where the search is made, or one which violates a legitimate expectation of personal privacy. A search, and a consequent seizure, made without probable cause is unreasonable on its face, and violates both the Fourth Amendment and the due process requirements of the Fifth and Fourteenth Amendments. But a search or seizure upon probable cause which reaches an arguably private interest is not necessarily violative of the Fourth Amendment: it may be made reasonable by the prior acquisition of a judicial warrant; or it may be reasonable by virtue of a specific judicially recognized exception to the warrant requirement;[2] or it may be reasonable because, on balance, the warrantless intrusion complained of does not violate a legitimate expectation of privacy in light of all of the surrounding circumstances.[3] It is in this last category that the valid seizure in this case fits.

2. There is no legitimate expectation of privacy in appellant's bank account.

In *United States v. Miller*, 425 U.S. 435 (1976), the Court upheld a warrantless seizure of an individual's bank records pursuant to an administrative *subpoena duces tecum*, finding that the records were not "private papers."[4]

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[2]*See, e.g., Cupp v. Murphy*, 412 U.S. 291 (1973) (exigent circumstances: potential loss of evidence); *Chambers v. Maroney*, 399 U.S. 42 (1970) (automobile search: warrant would not enhance protection where car searched after legal seizure; court observes "constitutional difference between houses and cars."); *See v. City of Seattle*, 387 U.S. 541 (1967) (regulatory search of business premises).

[3]*cf. United States v. Miller*, 425 U.S. 435 (1976) discussed, *infra*; also note development of "plain view" rationale where there is no legitimate expectation of privacy (e.g., *Harris v. United States*, 390 U.S. 234 (1968)).

[4]*United States v. Miller*, 425 U.S. 435 (1976). The Court in *Miller* rejected an argument based upon *Boyd v. U.S.*, 116 U.S. 616 (1886), that there was an ownership interest which led to a legitimate expectation of privacy. The Court found that the bank was a party, negating any individual expectation of privacy in the transactions. 425 U.S. at 441. The Washington State Supreme Court used parallel

The Court held that there was "no legitimate 'expectation of privacy'" in bank records. 425 US., at 442. The Court noted that in transactions with a bank, a depositor knowingly "reveal[s] his affairs," 425 U.S., at 443 and, "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." 425 U.S., at 442, quoting *Katz v. United States*, 389 U.S. 347, 351 (1967).

Miller involved the seizure pursuant to *subpoena* of records for the investigation of a crime; the instant case involves the seizure of funds to satisfy a tax deficiency judgment filed in Superior Court. Where there is no legitimate expectation of privacy in detailed and comprehensive records of a series of transactions with a bank over time, there can hardly be such an expectation in the protection from seizure of a fixed sum of money held by that bank and reflected in a portion of those records.

3. *Miller* is consistent with prior decisions of the Court in finding no legitimate expectation of privacy in bank records.

This Court has not found every warrantless search of an arguably private area to be in violation of the Fourth Amendment. In *Katz v. United States, supra*, attention was turned from the protection of specific places and things to an inquiry into the legitimate expectation of privacy, wherever it might be found, and the degree to which that expectation is generally recognized. As stated in the concurring opinion of Justice Harlan:

> "[T]he Court's opinion states[,] "The Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from

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reasoning in rejecting appellant's argument that he had a privacy interest in the funds themselves. The Court noted that under state law, monies on deposit are property of the bank, establishing a debtor-creditor relationship: the depositor has a contractual right to be paid by the bank, but has neither title nor possessory interest in the funds. *Peters v. Sjoholm*, 95 Wn.2d 971, 975 (1981).

> prior decisions is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second that the expectation be one that society is prepared to recognize as "reasonable." *Katz v. United States*, 389 U.S. at 361.

Katz appropriately broadens the focus of Fourth Amendment analysis and protection. In effect, *Katz* establishes a functional Fourth Amendment analysis, based on real and manifest expectations of privacy, rather than a formulary one based on a list of specific physical areas. It has been noted that this broadening of scope implies an increased flexibility as well, and that *Katz* should not be read to expand the warrant requirement to reach all searches which come under Fourth Amendment scrutiny as a result of the expansion. In *United States v. Chadwick*, 433 U.S. 1 (1977) the Court looked at the expectation of privacy as something relative, and dependent upon the surrounding circumstances (diminished expectation surrounding an automobile); in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court spoke of a warrantless seizure on probable cause as permissible because it involved only a minor peril to Fourth Amendment protections. The direction is clear:

> "From these declarations in *Chadwick* and *Coolidge*, there might well be constructed a proposition that the warrant clause need not be applied to certain minor intrusions brought within the Fourth Amendment by *Katz*, for they involve only a "minor peril" and encroach upon one's justified expectation of privacy only slightly. 1 W. LaFave, *Search and Seizure*, 239 (1978).

The treatment of the seizure of records in *G.M. Leasing v. United States*, 429 U.S. 338 (1979), is thus an appropriate use of *Katz*, and illustrative of the outer boundary of permissible summary collection procedure. *G.M. Leasing* involved an I.R.S. warrantless seizure of a delinquent taxpayer's assets under a jeopardy assessment authorized by federal statute. Untroubled by the I.R.S. seizure of automobiles in the open, where there was no legitimate expectation of privacy, this Court found the war-

rantless seizure of corporate business records in a private house to be impermissible under the Fourth Amendment. The problem, wrote Justice Blackmun for the majority, was that the federal statute under which the I.R.S. agents were operating "[Is] an authorization for all forms of *seizure*, but [is] silent on the subject of intrusions into privacy." (Emphasis in original). 429 U.S. 358. The Court's objection was not to the seizure *per se* or its statutory underpinning, but to the intrusive nature of the particular search as conducted. The Court found that the seizure, without notice, of corporate records during a warrantless surreptitious entry and search of premises used as a dwelling place amounted to an invasion of reasonably expected privacy, and thus an unreasonable search.

G.M. Leasing thus makes it clear that summary collection powers are not unlimited, and where a particular search or seizure rises to the level of an unreasonable intrusion into privacy, then a warrant may be required as a prior safeguard. *G.M. Leasing*, which involved the surreptitious physical search of a dwelling and the dragnet seizure of all records and papers found inside, with potentially irreparable harm to the taxpayer in the information thus collected, provides one guidepost. *United States v. Miller, supra*, where the summary seizure of bank records was found not to come under the protection of the Fourth Amendment, provides the other. Together, they adequately guide the lower Courts to the appropriate result, which is permissible summary collection of taxes without excessive or unreasonable intrusion into privacy.

4. The seizure of funds in appellant's bank account and the procedure followed in that seizure are reasonable in light of all the circumstances.

(a) The seizure of funds in appellant's bank account was made upon probable cause and in conformity with applicable statutes.

The Washington Supreme Court stated that appellee "may seize bank funds when it complies with the relevant statutes and has probable cause to believe the bank funds

belong to the taxpayer." *Peters v. Sjoholm*, 95 Wn.2d 871, 876 (1981). It is not contended that appellee failed to follow the relevant statutes;[5] and probable cause was established at the trial court.[6] Appellant correctly makes no contention here that the search was made without probable cause.

(b) There are adequate procedural safeguards for appellant to (i) challenge the assessment, (ii) prevent the search or seizure, (iii) recoup the seized funds without ultimate loss.

Before a summary collection is made, the statutory scheme for the collection of taxes employed here has at least four separate steps in which a taxpayer has notice and an opportunity to be heard, even after the taxpayer's initial failure to file timely returns.[7] Here, agents for the Department of Revenue went further, granting a hearing even after the taxpayer had allowed the time for appeal to pass.[8] Notice was given of appellee officer's intention to file a tax warrant and the warrant was entered on the judgment docket before collection could proceed.[9] Throughout this process, appellant could have prevented the seizure of his funds, with its alleged intrusion upon his privacy, either by paying the tax or by moving the funds out of his bank account.

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[5]*See* RCW 82.32.100; 82.32.110; 82.32.130; 82.32.160; 82.32.210; 82.32.220; 82.32.230; 82.32.235, Appendix D.

[6]*See* Affidavit of Sjoholm, Appendix B.

[7]*See* WAC 458-20-100, Appendix C; RCW 82.32.100, RCW 82.32.160, RCW 82.03.190, Appendix D. Opportunity to discuss with auditor, RCW 82.32.100; audit supervisor conference prior to assessment, WAC 458-20-100(1); conference for examination and review of assessment, WAC 458-20-100(2), (8), (9), RCW 82.32.160; director's conference, WAC 458-20-100(14), (15); petition for correction of assessment before Washington Board of Tax Appeals, WAC 458-20-100(16), RCW 82.03.190.

[8]The text of the Hearing Examiner's determination is reproduced as Appendix A. See *Peters v. Sjoholm*, 25 Wn.App. 39, 604 P.2d 507 (1979) for a review of the procedure followed in this case.

[9]*See* RCW 82.32.220, Appendix D.

(c) Appellant suffers no serious harm by the seizure of funds from his bank account.

While the interest which appellant seeks to protect does not embody a recognized expectation of privacy, it should also be noted that the seizure herein causes appellant no irremediable harm. The Court has properly been most stringent in its application of the Fourth Amendment warrant requirement where the invasion of privacy complained of results in the discovery of information which is the *sine qua non* for a successful criminal prosecution.[10]

The unreasonable invasion of privacy in such a case is substantial, and the resulting harm irreparable.[11] But that, however, is obviously not the case here. The only adverse effect of the seizure in this case is a transient one: to recover the money seized, appellant need only petition for a refund or bring a refund action to establish that he is not liable for the tax.[12]

5. The addition of the requirement of a judicial warrant to the statutory process would not significantly enhance the safeguards already present.

Appellant's Fourth Amendment challenge may be reduced to the contention that appellee's statutory procedure must include a judicial warrant between the administrative hearing and the filing of the tax warrant and the Notice to Withhold and Deliver: unquestionably the addition of that step would put the procedure beyond challenge. Yet in this case, in view of the notice; the opportunity to be heard; the multi-layered Departmental review of the findings prior to assessment or levy on the docketed judgment, and the adequate remedy, the

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[10]*cf. United States v. Chadwick, supra*; *Katz v. United States, supra.*

[11]The irreparability of the harm thus caused eventually led the Court to adopt as a deterrent the exclusionary rule for evidence acquired in a warrantless invasion of a legitimate expectation of privacy. *See, e.g., Mapp v. Ohio,* 367 U.S. 643 (1961).

[12]*See* RCW 82.32.170; RCW 82.32.180, Appendix D.

additional step of a warrant would afford but little added protection against an improper seizure.

Where a warrant has been required before law enforcement officers can delve into a constitutionally protected area of privacy, the warrant has served three substantial functions. First, a warrant requires a high degree of specificity about the object of the search and the items to be seized. This specificity places important limits upon the potential invasion of privacy associated with a search or seizure. Second, the requirement of a warrant forces an interval during which the assumptions and conclusions of the law enforcement officer conducting the search or seizure are articulated and reviewed by an impartial authority. And third, the warrant gives immediate notice, upon presentation, of the specific things to be seized.

The first function insures that the intrusion upon privacy will be minimized; the second reduces the likelihood that it will be an arbitrary or unnecessary one, and the third gives the one whose privacy is involved notice of the limits on the permissible invasion. In this case, those important functions of a judicial warrant are already well served by the procedures followed by appellee. The tax warrant fixes the amount, and the Notice to Withhold and Deliver is highly specific and inherently limited: it seeks only a designated amount of money in a single place. The procedure followed prior to making the seizure includes far more elaborate review than that required for a warrant: only after a field audit, departmental review, and an opportunity for an administrative hearing, can the warrant be filed in Superior Court.[12] It is then entered on the judgment docket before levy and collection can begin. And notice, of course, of the actual amount to be seized, is given repeatedly from the time the initial assessment is made, at the outset of the proceeding.

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[12] *See* Affidavit of Sjoholm, Appendix B; RCW Ch. 82.32, Appendix D; WAC 458-20-100, Appendix C; Determination, Appendix A.

B. THE QUESTION PRESENTED IN THIS APPEAL IS INSIGNIFICANT AND DOES NOT REQUIRE FULL REVIEW BY THIS COURT.

Appellant argues that review is necessary to reconcile conflicting cases, but the decisions of this Court are consistent in their treatment of summary tax collection cases in light of the development of the warrant requirement as a constitutional safeguard in the context of law enforcement activity.

This Court recognizes that summary tax assessment powers do not violate due process.[14] *G.M. Leasing* makes it clear that a seizure pursuant to collection authority must not be an unreasonable invasion of privacy. *Miller* makes it clear that a depositor can have no legitimate expectation of privacy in the records of his bank account. These lines of cases are not inconsistent, but complementary. The first establishes the validity of the procedure; the second sets an outer limit at which the warrant requirement is triggered, and the third places this case squarely on the middle ground: a legitimate summary seizure which does not amount to an invasion of privacy.

Appellant argues that "confusion" must be reconciled,[15] but in his own classification provides the clarification for the argued confusion. Three separate lines of Fourth Amendment cases bear on this issue,[16] but all point

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[14]*See* Jurisdictional Statement, Page 7; *Den ex dem. Murray v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856); *Phillips v. Commissioner*, 283 U.S. 589 (1931).

[15]*See* Jurisdictional Statement, Page 12, note 16, *infra*. Appellant cites state cases in which the reach of the Fourth Amendment is "debated." *Burrows v. Superior Court of San Bernardino Co.*, 13 Cal.3d 238, 118 Cal. Rptr. 166, 529 P.2d 590 (1975), decided before the Fifth Circuit decision in *Miller* was reversed, required a warrant for seizure of bank records in a criminal prosecution. *People v. Blair*, 25 Cal.3d 640, 159 Cal. Rptr. 818, 602 P.2d 738 (1979), decided after *Miller*, makes it clear that the warrant in *Burrows* is required on state grounds. Note that the Washington Supreme Court found no state requirement for a warrant absent a Federal requirement in this case. *Peters v. Sjoholm*, *supra*.

[16]Appellant notes the lines of expectation of privacy cases (*Miller*, *G.M. Leasing* and *Katz*, *supra*) and Due Process summary assessment cases (see note 14, *supra*), then focuses on a distinction between penal

to the logical result from which appellant herein has appealed.

SUMMARY

The presence in this case of probable cause, adequate procedural due process, and the balance of a relatively small and easily remedied harm against a strong state interest must all be viewed in the context of an expectation of privacy which is minimal at best. Given these circumstances, a warrant is not required to make this seizure reasonable under the Fourth Amendment.

CONCLUSION

The State of Washington respectfully submits that the questions raised by this appeal are so insubstantial as not to need further argument or examination. It moves the Court to dismiss the appeal or alternately to affirm the judgment entered by the Supreme Court of Washington.

Respectfully submitted,

KENNETH O. EIKENBERRY,
Attorney General,
State of Washington

LELAND T. JOHNSON,

TIMOTHY R. MALONE,

WILLIAM B. COLLINS,

ANDREW C. HARVARD,
Assistant Attorneys General,

Attorneys for Appellees.

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forfeiture cases (*e.g., United States v. One 1974 Pontiac Le Mans*, 621 F.2d 444 (1st Cir. 1980); seizure of derivative contraband permissible without warrant); evidentiary seizure cases (*e.g., In re Grand Jury Proceedings*, 483 F.Supp. 422 (E.D. Pa. 1979); bank records not available to state from federal grand jury if effect is to circumvent a state warrant requirement) and true assessment seizure cases (*e.g., United States v. First National City Bank*, 388 F.Supp. 1044 (S.D.N.Y. 1974); taxpayer may not intervene to prevent I.R.S. seizure of safe deposit box).

APPENDIX A

DANIEL J. EVANS, GOVERNOR
MARY ELLEN McCAFFREE, DIRECTOR

STATE OF WASHINGTON
DEPARTMENT OF REVENUE
OLYMPIA 98504

BEFORE THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessments of	)	DETERMINATION
	)	No. 76-76
G & J TRUCKING, INC.	)	Registration No. C213 000 999
and	)	
GENE M. PETERS P.O. Box 1 Clenoma, Washington 98336	)	Registration No. J219 001 777

TAXPAYER REPRESENTED BY: Gene M. Peters

DEPARTMENT OF REVENUE REPRESENTED BY
INTERPRETATION AND APPEALS DIVISION: Edward L. Faker, Hearing Officer
FIELD OPERATION DIVISION: P.D. Arvan, Assistant Regional Director

DATE AND PLACE OF CONFERENCE: April 26, 1976; Olympia, Washington

FACTS:

The business records of G & J Trucking, Inc., (C213 000 999), were audited for the period from January 1, 1971 through June 30, 1975, revealing a total tax and interest deficiency of $4,749.80. Tax assessment 87985 in that amount was issued on November 6, 1975. This assessment was not paid by the due date shown thereon, November 26, 1976, and, accordingly, a Warrant for Unpaid Tax No. 165610 was issued on February 6, 1976. The warrant included delinquent penalty, additional interest and warrant penalty for a total due of $5,560.31, plus extension interest accrued from the date of issue of the warrant. This amount remains unpaid.

The business records of Gene M. Peters, (J219 001 777), operating as a sole proprietorship, were audited for the period from January 1, 1971 through June 30, 1975, revealing a total tax and interest deficiency of $1,501.14. Tax assessment 87993 in that amount was issued on November 6, 1975. The assessment was not timely paid which resulted in the issuance of tax Warrant 165609 on February 6, 1976. The warrant included delinquent penalty, additional interest and warrant penalty for a total due of $1,718.79. This amount remains unpaid.

The assessment and warrant of G & J Trucking, Inc., represents business and occupation tax under the Extracting classification upon amounts paid by U.S. Plywood Corporation as the buyer of logs owned by G & J Trucking under a timber contract with the U.S. Forest Service. Also assessed was use tax, (1) upon the value of snow removal equipment upon which no sales tax was paid by G & J Trucking at time of its purchase, and; (2) upon diesel fuel consumed by the taxpayer for off-highway use and upon which no motor vehicle fuel tax had been paid.

The assessment and warrant of Gene M. Peters, sole proprietor, represents business and occupation tax under the Retailing classification upon income of record from the rental of heavy duty equipment to G & J Trucking, Inc. Also assessed was use tax upon the value of tangible personal property removed by Mr. Peters from his grocery store and service station and used as a consumer by him without payment of sales tax.

TAXPAYER'S EXCEPTIONS:

Mr. Gene M. Peters appeared at the April 26, 1976 hearing, pro se, as representative for both business entities.

G & J Trucking, Inc.
(C213 000 999)

This taxpayer asserts that the amounts paid by U.S. Plywood Corporation did not constitute taxable income to G & J Trucking, Inc. The taxpayer explains that it purchased standing timber from the U.S. Forestry Service. The timber could not be extracted by conventional logging means and therefore the taxpayer contracted with Erickson Air Crane Company to perform the yarding work. The taxpayer's financial situation was such that in order to secure this sub-contract work it had to agree to payment directly from U.S. Plywood Corporation to Erickson Air Crane. Thus, the taxpayer was bypassed on these payments and U.S. Plywood directly compensated Erickson. The timber yarded by Erickson was separately branded and separately paid for by U.S. Plywood. The taxpayer claims that these payments did not constitute part of its taxable income but rather was income taxable directly to Erickson Air Crane.

At the April 26, 1976 hearing the taxpayer agreed to submit copies of all contracts relevant to the timber purchase and subcontract work. However, on May 28, 1976, Mr. Peters advised the Hearing Officer by telephone communication that no such documentation would be submitted because in Mr. Peters opinion this matter was not resolvable at this level of administrative appeal.

As to use tax assessed upon snow removal equipment purchased in Oregon and brought into this state for use here by the taxpayer, it is asserted only that Article I, Section 10, Clause 2, of the Federal Constitution places doubt upon the taxpayer's liability. No specific protest on the merits of this issue was made.

At the April 26, 1976 hearing the nature of the use tax liability upon motor fuel purchased for off-highway use was again explained to Mr. Peters who conceded liability and agreed to pay this tax. On May 28, 1976 Mr. Peters advised the Hearing Officer by telephone that such payment would not be made. No specific protest on the merits of this issue has ever been stated.

Gene M. Peters (Sole Proprietor)
(J219 001 777)

In 1971 Mr. Peters did some small logging contract work. During the audit period through 1974 he operated a service station and grocery store. In 1972 he purchased, in his own right, certain logging equipment (trucks) which was put to use by G & J Trucking, Inc. of which Mr. Peters is sole stockholder. In return for its use of the trucks G & J Trucking, Inc., made the payments due on their purchase directly to the financing company. Mr. Peters entered these payments on his sole proprietorship books as "rentals received". The auditor assessed Retailing business and occupation tax upon the amounts but allowed an offset of retail sales tax due on these rental payments to the extent that Mr. Peters had paid retail sales tax at the source when he purchased the trucks.

The taxpayer asserts that his capacity as sole proprietor cannot be distinguished from his corporate capacity. It is argued that his business records were arranged in this manner only to protect certain business property from attachment in a domestic legal matter. On April 17, 1975 Mr. Peters was divorced and an order of the Lewis County Superior Court ruled that there was no distinction between G & J Trucking, Inc. and Mr. Peters individually. Mr. Peters claims that the Lewis County Court pierced the corporate veil and made all property, both corporate and separate, subject to community property settlement. The taxpayer relies upon this order in arguing that he and G & J Trucking are not separate entities. Thus, he could not be found to be leasing the trucks to himself or some non-existent entity. No copy of or specific citation reference to this order was submitted because the taxpayer asserts that the Department of Revenue has the burden of disproving his contention.

Regarding use tax assessed upon the value of certain withdrawals made by Mr. Peters from his store inventory, Mr. Peters asserts that no records are available to establish the amount or value of such items. Although beginning and ending inventories did not reconcile with sales and Mr. Peters admits to some withdrawals, he again asserts that the burden of actually proving amounts and values of items withdrawn as well as proving his actual use of the goods rests upon the Department of Revenue.

The taxpayer further asserts that the auditor made no allowances for breakage and theft, although he had reported several thefts to the County Sheriff's office. Again, the taxpayer asserts that the burden to document these occurrences rests upon the Department of Revenue.

Finally, the taxpayer asserts that the entire audit procedure and examination of his records without benefit of a search warrant was in violation of Federal Constitutional provisions, (uncited), and that any state laws providing for such audits are null and void.

DISCUSSION:

G & J Trucking, Inc.

The taxpayer, G & J Trucking, Inc., admittedly owned all of the logs sold to U.S. Plywood Corporation. The costs incurred to buck and yard those logs were all costs of the taxpayer, including the indebtedness incurred to Erickson Air Crane. As such, these costs are not deductible from the measure of the taxpayer's business and occupation tax notwithstanding that the taxpayer arranged to have this part of its costs paid directly by its buyer. It was the taxpayer who contracted to have the yarding work performed by Erickson. It was not U.S. Plywood Corporation which contracted for and incurred these costs. The taxpayer should have been reporting all of its gross income from local sales of its logs under the Wholesaling - Other classification of business and occupation tax. The taxpayer was so advised but could not understand the distinction between Extracting and Wholesaling. Because the measure of tax and rates of tax are the same for both of these business activities the auditor assessed the deficiency under the Extracting classification as the taxpayer had been reporting.

The statutory measure of both Extracting and Wholesaling - Other business and occupation tax on sales made within this state is the gross proceeds from such sales. RCW 82.04.070 defines "gross proceeds of sales" to mean,

> . . . the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses. (Emphasis supplied.)

This law is clear and unequivocal. Under its provisions the taxpayer may not deduct any costs it incurred in logging and yarding the logs sold to U.S. Plywood Corporation even if U.S. Plywood paid those costs directly. Tax liability cannot be avoided by the person who engages in the taxable activity merely because he makes an anticipatory assignment of some of the income.

Concerning the taxpayer's doubts about its liability for use tax upon snow removal equipment purchased in Oregon and put to business use as a consumer in Washington, we reject the contention that the import-export clause of the U.S. Constitution is prohibitive of such tax. The

use tax imposed by RCW 82.12.020 is not levied upon property as an ad valorem tax nor is it imposed upon property imported or exported because of such importation or exportation. We have been presented with no specific argument by the taxpayer in support of its suggestion that this state's use tax is constitutionally prohibited when applied to the use here of property brought here from outside the state. We can only respond by generally referring the taxpayer to the plethora of judicial statements on point originating with Brown v. Maryland, 12 Wheat 419, (1827), and most recently culminating in Michelin Tire Corporation v. Wages, Tax Commissioner, et al, 46 Law Ed. 2nd 495, (1976). As stated in Michelin at page 8511, it is only taxes of a "particular category" that are prohibited--duties and imposts on imports. Washington State's use tax is not such a duty or impost.

The taxpayer has admitted to having purchased diesel fuel for off-highway use without payment of motor vehicle fuel tax. Use tax upon such fuel has been properly assessed. WAC 458-20-126 (Rule 126), provides as follows:

> It is the intent of the law that all vehicle fuels will be subject to either the vehicle fuel taxes (82.36 RCW or 82.38 RCW) or else the sales or use taxes of the Revenue Act (82.08 RCW or 82.12 RCW).

Gene M. Peters (Sole Proprietor)

For excise tax purposes the taxpayer, Gene M. Peters, (J219 001 777) and the taxpayer G & J Trucking, Inc., (C213 000 999) are separate persons and separate taxable entities. The Revenue Act defines the term, "person" for state tax purposes in RCW 82.04.030 as follows:

> "Person" or "company", herein used interchangeably, means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof.

Mr. Peters and G & J Trucking, Inc., are separately registered with the Department of Revenue for purposes of carrying on wholly separate and distinguishable business operations. In fact, a primary purpose of incorporation is to establish and preserve the separateness of the corporate creature from its creators. The corporate veil is legally pierced only to avoid or undo inequity, not to avoid tax liability or the other legal duties attendant to the legal creation of the corporate entity.

The business records of Gene M. Peters reflect "rentals received" from G & J Trucking, Inc., in return for the latter entity's possession and use of tangible personal property. The trucks were the separate property of Gene M. Peters and never became coporate assets. The taxpayer's records are the best evidence of the business activities undertaken. Such transactions constitute leases between two individual and separate taxable entities, for consideration, (direct payment of purchase installments by G & J Trucking, Inc.). These transactions are as fully taxable as if there were no close relationship between the parties.

We have no evidence of any court order having been entered in Lewis County which would affect the foregoing conclusions in any way. Even if such an order were established and documented it would, by its nature, be limited to an adjustment of personal and corporate property ownership for property settlement purposes in divorce proceedings only. It is neither contended that such an order determines the relationship between Gene M. Peters and G & J Trucking, Inc., for purposes of the Revenue Act of this state, nor do we think it could.

Concerning use tax liability upon items withdrawn from store inventory, we find the audit technique used by the auditor to be proper in all respects. The method of reconciling sales to purchases or beginning and ending inventories is a technically correct and universally adopted method in absence of actual records of personal withdrawals by a store operator of items for his own use as a consumer. Generally such records, showing the amount and value of withdrawn items, are accurately maintained. In fact the Revenue Act requires such record keeping. RCW 82.32.070 provides in pertinent part as follows:

> Every person liable for any fee or tax imposed by chapters 82.04 through 82.28 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable. . . All his books, records, and invoices shall be open for examination at any time by the department of revenue. . . Any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceedings, the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved.

This statute clearly places the responsibility upon the taxpayer to maintain records from which his tax liability can be determined. The burden is not upon the Department of Revenue to prove tax liability in absence of the recordkeeping required by law.

With respect to claimed losses because of theft, breakage, pilferage, etc., the Department of Revenue has always stood ready to examine any records or documentation proffered in support of such claims. Again, the responsibility rests with the taxpayer, not the department, to establish such alleged facts.

Finally, we must reject the taxpayer's contention that the provisions of the Revenue Act which authorize the audit of taxpayer records and the issuance of tax assessments based thereon are constitutionally prohibited.

The Department is an administrative agency of the state and, as such, it is required to presume the constitutionality and legal validity of the laws it administers. In support of this position we note the following authorities:

> It is universally recognized that administrative agencies, as such, do not determine constitutional issues and specifically do not determine the constitutionality of statutes or ordinances under which they act the validity of which is and must be assumed by them until a judicial declaration to the contrary.
>
> 1 Am. Jur. 2d § 185 p. 989
>
> . . .
>
> In general, administrative agencies may not determine constitutional questions. Accordingly, they have no power or authority to consider or question the constitutionality of an act of the legislature or to decide with finality whether their own acts are in conformity with constitutional requirements as a matter of fact or law.
>
> 73 Corpus Juris Secundum § 67 p. 392

The Washington State Supreme Court has directly expressed this position in Bare v. Gorton, 84 Wn. 2d 380 (1975), as follows:

> An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power.
> (Citing: U.S. v. Kissinger, 250 F. 2d. 940, certiorari denied, 356 U.S. 958, 2 L. Ed 2d 1066 (1958)).

See also the Washington Supreme Court's decision in Yakima Clean Air v. Glascam Builders, 85 Wn 2d 255 (1976), which deals with administrative hearings. Concerning the constitutionality of the laws administered by the hearing agency the court stated:

The rule is well established that one claiming a constitutional right as a defense can proceed directly to assert that right in a judicial proceeding. There are several sound reasons for this rule. An administrative tribunal is without authority to determine the constitutionality of a statute, and, therefore, there is no administrative remedy to exhaust.

DECISION AND DISPOSITION:

The taxpayer's petition is denied. The Compliance Division will proceed immediately with collection of Tax Warrants 165609 and 165610.

DATED this 4th day of August, 1976.

STATE OF WASHINGTON DEPARTMENT OF REVENUE

Edward L. Faker, Hearing Officer

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

NO. 255298

AFFIDAVIT OF LES N. SJOHOLM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

GENE M. PETERS,

Plaintiff,

vs.

LES N. SJOHOLM and "JANE DOE" SJOHOLM, husband and wife; and PUGET SOUND NATIONAL BANK,

Defendants.

STATE OF WASHINGTON)
) ss.
County of Thurston)

LES N. SJOHOLM, being first duly sworn, on oath deposes and says:

1. That he is a Field Agent in the Compliance Section of the Washington State Department of Revenue and is defendant in this action; that the facts set forth in this affidavit are within his personal knowledge and that he is competent to testify as to the matters stated in this affidavit and that further such facts appear by way of records in the possession of the Washington State Department of Revenue and public records.

2. That this action was brought by the Plaintiff, Gene M. Peters to recover from the Defendant Les N. Sjoholm for damages. That in the complaint filed herein the plaintiff alleges that defendant's actions in enforcing payment of taxes owed the Washington State Department of Revenue violated plaintiff's constitutional rights.

3. That affiant can testify to the following facts, to wit: that the Washington State Department of Revenue audited plaintiff Gene M. Peters on October 6, 1975 and found the net amount due the Department of Revenue to

be $1,501.14. A true and correct copy of said audit is attached hereto as Exhibit A.

4. That based upon this audit Tax Assessment No. 87993 was issued on November 6, 1975, a copy of which assessment was sent to plaintiff Gene M. Peters. A true and correct copy of this tax assessment is attached hereto as Exhibit B.

5. That based upon Tax Assessment No. 87993 Tax Warrant No. 165609 was issued on February 6, 1976 in the amount of $1,718.79, a true and correct copy of which is attached hereto as Exhibit C.

6. That Tax Warrant No. 165609 was filed with the Clerk of the Superior Court of Lewis County on September 9, 1976 under Cause No. TR5464 resulting in judgment No. 901 in the amount of $1,718.79 of which the court may take judicial notice. A certified copy of this filed tax warrant is attached hereto as Exhibit D.

7. That by the normal investigative procedures of the Washington State Department of Revenue it was determined that the Morton Branch of the Puget Sound National Bank held funds belonging to the taxpayer.

8. That on October 1, 1976 I served a Notice and Order to Withold and Deliver on the Puget Sound National Bank-Morton Branch by personally delivering a full, true and correct copy of this notice to Ms. Hazel Wilson who was at that time Assistant Manager of the bank. A true and correct copy of said Notice and Order to Withhold and Deliver is attached hereto as Exhibit E.

9. That in serving the Notice and Order to Withhold and Deliver I performed the following procedural steps namely:

10. I notified the appropriate regional director that service of a Notice and Order to Withhold and Deliver was to be made and thereby received the authorization of the regional director to make service;

11. I caused the Notice and Order to Withhold and Deliver to be typed up in my office with four copies;

12. I proceeded to the Puget Sound National Bank-Morton Branch and made personal service upon Ms. Hazel Wilson of the white copy of the Notice and Order to Withhold and Deliver.

13. At the time of service I explained to Ms. Wilson that by law the bank was required to answer within twenty days of service as to whether it held property belonging to the delinquent taxpayer Gene M. Peters.

14. Also at the time of service for the return of service copy, a true and correct copy of which is attached hereto as Exhibit F, I obtained from the person upon whom I made service her name, title and I noted the time of day.

15. On the day of service I mailed to Gene M. Peters his copy of the Notice and Order to Withhold and Deliver. Similarly I attempted to assure that one copy of the Notice and Order to Withhold and Deliver would be mailed to the concerned regional director and one copy to the main (Olympia) office on the day of service.

16. That on October 10, 1976 the Washington State Department of Revenue acknowledged receipt of a cashier's check in the amount of $89.98 from the Puget Sound National Bank-Morton Branch in answer to the Department of Revenue's Notice and Order to Withhold and Deliver. A true and correct copy of this acknowledgment of receipt is attached hereto as Exhibit G.

17. That on October 8, 1976 the $89.98 cashier's check from Puget Sound National Bank-Morton Branch to the Washington State Department of Revenue was credited against the tax obligation of plaintiff Gene M. Peters as is shown in attached Exhibit H, which is a true and correct copy of the payment record regarding Tax Warrant No. 165609.

/s/_____

LES N. SJOHOLM

SUBSCRIBED AND SWORN TO before me this 5th day of December, 1977.

/s/_____

GREG MONTGOMERY, NOTARY PUBLIC in and for the State of Washington, residing at Olympia.

APPENDIX C

STATE OF WASHINGTON DEPARTMENT OF REVENUE

OLYMPIA, WASHINGTON

WAC 458-20-100 (Rule 100) APPEAL PROCEDURES

1. In any case of an account under audit where substantial agreement has not been reached between taxpayer and field auditor, the taxpayer is entitled to a preliminary conference with the auditor's immediate superior, the field audit unit supervisor, prior to finalization and submission to the audit report. Such conference is informal in nature, and is intended to clarify the issues in dispute resolving them where possible, and in any event effecting agreement as to the facts and figures involved. In those cases where agreement cannot be reached at this level as to the tax interpretations applied, the report will be finalized and submitted to Olympia, from where, following review and approval of the recommendations of the report, an assessment will be issued.

2. Any person having been issued a notice of assessment of additional taxes, delinquent taxes, penalties or interest may petition the Department of Revenue in writing for a correction of the amount of the assessment and a conference for examination and review of the assessment. Petitions should be addressed: State of Washington, Department of Revenue, Olympia, Washington 98504.

3. Under the law the petition must be received by the Department of Revenue within twenty days after the issuance of the original notice of the amount of the deficiency, or within the period covered by any extension of the due date granted by the department. An extension of thirty days in the due date of the assessment will be granted if additional time is required for preparation of the appeal and such extension is requested prior to expiration of the twenty day period. If no petition is filed within these time periods, the assessment covered by the notice shall become final.

4. Petitions for correction of assessment shall be in writing and shall set forth the reasons why the correction should be granted and the amount of tax, or of interest and penalties, as the case may be, which the petitioner believes to be due.

5. Any person having paid any tax, original assessment or corrected assessment of any tax may apply to the department within the time limitation for refund provided in RCW 82.32.060, by petition in writing for a correction of the amount paid and a conference for examination and review of the tax liability.

6. Petitions for refund shall be in writing and shall set forth the amount of the tax believed to have been overpaid, the date of payment, the periods for which such tax was paid and the reasons why the petitioner believes that a refund should be granted.

7. Petitions for correction of assessment and petitions for refund may be granted or denied by the Department of Revenue. If the petition is denied, the petitioner shall immediately be notified by mail.

8. The department may grant a conference for review of such petitions, fixing the time and place therefor and notifying the petitioner by mail.

9. Such conferences will be conducted by a Hearing Officer of the Department of Revenue, an employee especially trained in interpretation of the Revenue Act and the precedents established by prior departmental rulings and by the courts. Other departmental employees may be in attendance. The petitioner may appear personally or may be represented by an attorney, accountant or any other person competent to present his case. At the discretion of the department the conference may be scheduled before the Director or an Assistant Director.

10. All conferences before the Hearing Officers will be conducted informally.

11. Conferences before Hearing Officers will be held at district offices of the Department of Revenue, located so as to be as convenient as possible for the petitioner.

12. Following the conference, the Hearing Officer will make such determination as may appear to him just and lawful and in accordance with the rules, principles and precedents established by the Department of Revenue, and shall notify the taxpayer in writing of his decision.

13. The determination of the Hearing Officer shall be deemed to represent the official position of the Department of Revenue and shall be binding upon the taxpayer unless timely appealed.

14. If the petition was denied without a hearing or if the taxpayer believes that an error has been made in the determination of the Hearing Officer, he may, within twenty days after the date of the petition denial or of the determination, or within the period of any extension of the due date of the tax deficiency assessment, appeal in writing to the Director of Revenue for a review. The appeal shall indicate his reasons for thinking that the decision should be set aside.

15. The Director shall decide whether or not the decision is an error and may grant or deny a conference. If denied, the taxpayer shall receive written notice of such determination. If a conference is granted, it shall be held before the Director or an Assistant Director, shall be conducted informally, and shall be held at the departmental offices in Olympia. The determination of the Director or an Assistant Director shall be transmitted to the taxpayer in writing and shall represent the final determination of the Department of Revenue.

16. Appeals from determinations of the Department of Revenue on petitions for correction of assessment and petitions for refund may be taken to the Tax Appeals Board pursuant to the rules of the board. Petitions for hearing before the Tax Appeals Board must be filed with the Tax Appeals Board and copy thereof served upon the Interpretations and Appeals Division of the Department within thirty days after final action by the Department of Revenue. A taxpayer filing a petition for correction of assessment with the Tax Appeals Board must make payment of the assessment by the due date thereof unless arrangements are made with the Department of Revenue for a stay of collection pursuant to RCW 82.32.200. This statute gives the Department discretion to grant a stay upon the filing of a suitable bond in an amount up to twice the amount on which such a stay is requested along with satisfactory sureties to cover such amounts plus interest at the rate of 1% per month thereon for the duration of the requested stay. Upon the receipt of an offer of such a bond and sureties the Department will grant a stay only upon a determination that to do so would be in the best interest of the state.

17. Any taxpayer having paid any tax and feeling aggrieved by the amount of the tax may appeal directly to the Superior Court of Thurston County within the time limitation for refund provided in Chapter 82.32 RCW. (See RCW 82.32.180 for statutory requirements as to such appeals.)

18. Any taxpayer may petition the Department of Revenue for a prior determination of tax liability. Such petition shall contain all pertinent facts concerning the question presented and may contain a statement of the taxpayer's views concerning the correct application of the law. The department may grant or deny a conference in respect to such petition, but shall advise the taxpayer in writing of its determination, and such determination shall be binding upon both the taxpayer and the department under identical facts, and any future change in such determination shall have prospective application only.

19. All rules, determinations, orders, bulletins, and other similar interpretations of the law which have heretofore been issued by the Tax Commission and which are in effect June 30, 1967, shall be deemed to be interpretations by the Department of Revenue and shall be binding upon the department and on taxpayers to the same extent as if such interpretations had been made by the Department of Revenue.

Revised May 2, 1975
Effective June 1, 1975

APPENDIX D

Title 82 RCW: Excise Taxes, General Administrative Provisions

82.32.100 Failure to file returns——Assessment of tax by department——Penalties. If any person fails or refuses to make any return or to make available for examination the records required by this chapter, the department shall proceed, in such manner as it may deem best, to obtain facts and information on which to base its estimate of the tax; and to this end the department may examine the books, records, and papers of any such person and may take evidence, on oath, of any person, relating to the subject of inquiry.

As soon as the department procures such facts and information as it is able to obtain upon which to base the assessment of any tax payable by any person who has failed or refused to make a return, it shall proceed to determine and assess against such person the tax and penalties due, but such action shall not deprive such person from appealing to the superior court as hereinafter provided. To the assessment the department shall add, the penalties provided in RCW 82.32.090. The department shall notify the taxpayer by mail of the total amount of such tax, penalties, and interest, and the total amount shall become due and shall be paid within ten days from the date of such notice.

No assessment or correction of an assessment may be made by the department more than four years after the close of the tax year, except (1) against a taxpayer who has not registered as required by this chapter, (2) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer, or (3) where a taxpayer has executed a written waiver of such limitation

82.32.105 Waiver or cancellation of interest or penalties. If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or the failure of a taxpayer to pay any tax by the due

date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any interest or penalties imposed under this chapter with respect to such tax. The department of revenue shall prescribe rules for the waiver or cancellation of interest or penalties imposed by this chapter. Notwithstanding the foregoing the amount of any interest which has been waived, canceled or refunded prior to May 1, 1965 shall not be reassessed according to the provisions of this chapter.

82.32.110 Examination of books or records——Subpoenas——Contempt. The department of revenue or its duly authorized agent may examine any books, papers, records, or other data, or stock of merchandise bearing upon the amount of any tax payable or upon the correctness of any return, or for the purpose of making a return where none has been made, or in order to ascertain whether a return should be made; and may require the attendance of any person at a time and place fixed in a summons served by any sheriff in the same manner as a subpoena is served in a civil case, or served in like manner by an agent of the department of revenue.

The persons summoned may be required to testify and produce any books, papers, records, or data required by the department with respect to any tax, or the liability of any person therefor.

The director of the department of revenue, or any duly authorized agent thereof, shall have power to administer an oath to the person required to testify; and any person giving false testimony after the administration of such oath shall be guilty of perjury in the first degree.

If any person summoned as a witness before the department, or its authorized agent, fails or refuses to obey the summons, or refuses to testify or answer any material questions, or to produce any book, record, paper, or data when required to do so, he shall be guilty of contempt, and the department shall thereupon institute pro-

ceedings in the superior court of Thurston county, or of the county in which such person resides, to punish him as for contempt of court.

82.32.130 Notice and orders——Service. Notwithstanding any other law, any notice or order required by this title to be mailed to any taxpayer may be served in the manner prescribed by law for personal service of summons and complaint in the commencement of actions in the superior courts of the state, but if the notice or order is mailed, it shall be addressed to the address of the taxpayer as shown by the records of the department of revenue, or, if no such address is shown, to such address as the department is able to ascertain by reasonable effort. Failure of the taxpayer to receive such notice or order whether served or mailed shall not release the taxpayer from any tax or any increases or penalties thereon.

82.32.160 Correction of tax——Administrative procedure——Conference——Determination by department. Any person having been issued a notice of additional taxes, delinquent taxes, interest, or penalties assessed by the department of revenue, may within twenty days after the issuance of the original notice of the amount thereof or within the period covered by any extension of the due date thereof granted by the department petition the department in writing for a correction of the amount of the assessment, and a conference for examination and review of the assessment. The petition shall set forth the reasons why the correction should be granted and the amount of the tax, interest, or penalties, which the petitioner believes to be due. The department shall promptly consider the petition and may grant or deny it. If denied, the petitioner shall be notified by mail thereof forthwith. If a conference is granted, the department shall fix the time and place therefor and notify the petitioner thereof by mail. After the conference the department may make such determination as may appear to it to be just and

lawful and shall mail a copy of its determination to the petitioner. If no such petition is filed within the twenty day period the assessment covered by the notice shall become final.

The procedures provided for herein shall apply also to a notice denying, in whole or in part, an application for a pollution control tax exemption and credit certificate, with such modifications to such procedures established by departmental rules and regulations as may be necessary to accommodate a claim for exemption or credit.

82.32.170 Reduction of tax after payment——Petition——Conference——Determination by department. Any person, having paid any tax, original assessment, additional assessment, or corrected assessment of any tax, may apply to the department within the time limitation for refund provided in this chapter, by petition in writing for a correction of the amount paid, and a conference for examination and review of the tax liability, in which petition he shall set forth the reasons why the conference should be granted, and the amount in which the tax, interest, or penalty, should be refunded. The department shall promptly consider the petition, and may grant or deny it. If denied, the petitioner shall be notified by mail thereof forthwith; if a conference is granted, the department shall notify the petitioner by mail of the time and place fixed therefor. After the hearing the department may make such determination as may appear to it just and lawful, and shall mail a copy of its determination to the petitioner.

82.32.180 Court appeal——Procedure. Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32

RCW. In the appeal the taxpayer shall set forth the amount of the tax imposed upon him which he concedes to be the correct tax and the reason why the tax should be reduced or abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the department within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston county. Within ten days after filing notice of appeal, the taxpayer shall file with the clerk of the superior court a good and sufficient surety bond payable to the state in the sum of two hundred dollars, conditioned to diligently prosecute the appeal and pay the state all costs that may be awarded if the appeal of the taxpayer is not sustained.

The trial in the superior court on appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. The burden shall rest upon the taxpayer to prove that the tax as paid by him is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent, relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer. Either party shall be allowed to appeal to the supreme court or the court of appeals in the same manner as other civil actions are appealed to those courts.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the director for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

The provisions of this section shall not apply to any tax payment which has been the subject of an appeal to the board of tax appeals with respect to which appeal a formal hearing has been elected.

82.32.190 Stay of collection pending suit. The department, by its order, may hold in abeyance the collection of tax from any taxpayer or any group of taxpayers when a question bearing on their liability for tax hereunder is pending before the courts: *Provided*, That the department may impose such conditions as may be deemed just and equitable and shall require the payment of interest at the rate of three–quarters of one percent of the amount of the tax for each thirty days or portion thereof from the date upon which such tax became due.

82.32.200 Stay of collection——Bond. When any assessment or additional assessment has been made, the taxpayer may obtain a stay of collection, under such circumstances and for such periods as the department of revenue may by general regulation provide, of the whole or any part thereof, by filing with the department a bond in an amount, not exceeding twice the amount on which stay is desired, and with sureties as the department deems necessary, conditioned for the payment of the amount of the assessments, collection of which is stayed by the bond, together with the interest thereon at the rate of one percent of the amount of such assessment for each thirty days or portion thereof from the due date thereof until paid.

82.32.210 Tax warrant——Levy upon property——Revocation of certificate of registration. If any tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the department of revenue may issue a warrant under its official seal directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county, or so much thereof as may be necessary, for the payment of the amount of such warrant, together with interest thereon at the rate of one percent of the amount of such warrant for each thirty days or portion thereof after the date of such warrant, plus the cost of executing the warrant, and return the warrant to the department

of revenue and pay to it the money collected by virtue thereof within sixty days after the receipt of the warrant. If, however, the department of revenue believes that a taxpayer is about to cease business, leave the state, or remove or dissipate the assets out of which taxes or penalties might be satisfied and that any tax or penalty will not be paid when due, it may declare the tax or penalty to be immediately due and payable and may issue a warrant immediately.

If any warrant issued under this chapter is not paid within thirty days after it has been filed with the clerk of the superior court, or if any taxpayer shall, for three consecutive reporting periods, be delinquent in the transmission to the department of revenue of retail sales tax collected by him, the department of revenue may by order issued under its official seal, revoke the certificate of registration of the taxpayer against whom the warrant was issued, and, if such order is entered, a copy thereof shall be posted in a conspicuous place at the main entrance to the taxpayer's place of business and shall remain posted until such time as the warrant has been paid. Any certificate so revoked shall not be reinstated, nor shall a new certificate of registration be issued to the taxpayer, until the amount due on the warrant has been paid, or provisions for payment satisfactory to the department of revenue have been entered, and until the taxpayer has deposited with the department of revenue such security for payment of any taxes, increases, and penalties, due or which may become due in an amount and under such terms and conditions as the department of revenue may require, but the amount of the security shall not be greater than one–half the estimated average annual liability of the taxpayer.

82.32.220 Execution of warrant——Lien——Satisfaction. The sheriff shall file with the clerk of the superior court of his county a copy of the warrant, and thereupon the clerk shall enter in the judgment docket, the name of the taxpayer mentioned in the warrant and

in appropriate columns the amount of the tax or portion thereof and any increases and penalties for which the warrant is issued and the date when such copy is filed, and thereupon the amount of such warrant so docketed shall become a specific lien upon all goods, wares, merchandise, fixtures, equipment, or other personal property used in the conduct of the business of the taxpayer against whom such warrant is issued, including property owned by third persons who have a beneficial interest, direct or indirect, in the operation of the business, and no sale or transfer of such personal property shall in any way affect such lien. The lien shall not be superior, however, to bona fide interests of third persons which had vested prior to the filing of the warrant when such third persons do not have a beneficial interest, direct or indirect, in the operation of the business, other than the securing of the payment of a debt or the receiving of a regular rental on equipment: *Provided, however,* That the phrase "bona fide interests of third persons" shall not include any mortgage of real or personal property or any other credit transaction that results in the mortgagee or the holder of the security acting as trustee for unsecured creditors of the taxpayer mentioned in the warrant who executed such chattel or real property mortgage or the document evidencing such credit transaction. The amount of such warrant so docketed shall thereupon also become a lien upon the title to and interest in all other real and personal property of the taxpayer against whom it is issued the same as a judgment in a civil case duly docketed in the office of such clerk, and the sheriff shall thereupon proceed upon the same in all respects and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgments of the superior court. Such warrants so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the state in the manner provided by law in the case of judgments wholly or partially unsatisfied.

The sheriff shall be entitled to fees as provided by law

for his services in levying execution on a superior court judgment and the clerk shall be entitled to a filing fee as provided by law, which shall be added to the amount of the warrant.

82.32.230 Agent of the department of revenue may execute. In the discretion of the department of revenue, a warrant of like terms, force, and effect may be issued and directed to any agent of the department authorized to collect taxes, and in the execution thereof such agent shall have all the powers conferred by law upon sheriffs, but shall not be entitled to any fee or compensation in excess of the actual expenses paid in the performance of such duty, which shall be added to the amount of the warrant.

82.32.235 Notice and order to withhold and deliver property due or owned by taxpayer——Bond——Judgment by default. In addition to the remedies provided in this chapter the department is hereby authorized to issue to any person, or to any political subdivision or department of the state, a notice and order to withhold and deliver property of any kind whatsoever when there is reason to believe that there is in the possession of such person, political subdivision or department, property which is or shall become due, owing, or belonging to any taxpayer against whom a warrant has been filed.

The notice and order to withhold and deliver shall be served by the sheriff of the county wherein the service is made, or by his deputy, or by any duly authorized representative of the department. Any person, or any political subdivision or department upon whom service has been made is hereby required to answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice.

In the event there is in the possession of any such person or political subdivision or department, any prop-

erty which may be subject to the claim of the department, such property shall be delivered forthwith to the department of revenue or its duly authorized representative upon demand to be held in trust by the department for application on the indebtedness involved or for return, without interest, in accordance with final determination of liability or nonliability, or in the alternative, there shall be furnished a good and sufficient bond satisfactory to the department conditioned upon final determination of liability.

Should any person or political subdivision fail to make answer to an order to withhold and deliver within the time prescribed herein, it shall be lawful for the court, after the time to answer such order has expired, to render judgment by default against such person or political subdivision for the full amount claimed by the department in the notice to withhold and deliver, together with costs.

Title 82 RCW: Board of Tax Appeals

82.03.190 Appeal to board from denial of petition or notice of determination as to reduction or refund—— Procedure. Any person having received notice of a denial of a petition or a notice of determination made under RCW 82.32.160, 82.32.170, *83.24.025, or 83.58.120 may appeal, within thirty days from the date of the notice of such denial or determination, to the board of tax appeals. In the notice of appeal the taxpayer shall set forth the amount of the tax which he contends should be reduced or refunded and the reasons for such reduction or refund, in accordance with rules of practice and procedure prescribed by the board. The appeal shall be perfected by serving a copy of the notice of appeal upon the department of revenue within the time specified herein and by filing the original thereof with proof of service with the clerk of the board: *Provided, however,* That if the notice of appeal relates to an application made to the

department of revenue under chapter 82.34 RCW, the taxpayer shall set forth the amount to which the taxpayer claims the credit or exemption should apply, and the grounds for such contention, in accordance with rules of practice and procedure prescribed by the board. If the taxpayer intends that the hearing before the board be held pursuant to the administrative procedure act (chapter 34.04 RCW), the notice of appeal shall also so state. In the event that the notice of appeal does not so state, the department may, within ten days from the date of its receipt of the notice of appeal, file with the clerk of the board notice of its intention that the hearing be held pursuant to the administrative procedure act.